IN THE

Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

TABLE OF APPENDICES

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APPENDIX A

Opinion by the U.S. Court of Appeals for the Tenth Circuit (March 25, 2025)

FILED
United States Court of Appeals
Tenth Circuit

March 25, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OTIS RAY WHITEHEAD, JR.,

Defendant - Appellant.

No. 24-6062
(D.C. No. 5:23-CR-00280-J-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MORITZ**, **EID**, and **FEDERICO**, Circuit Judges.

Otis Ray Whitehead, Jr., appeals his conviction and sentence on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm.[1]

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Judge Federico joins this Order and Judgment except for Part II.B.

I. Background

Whitehead was the subject of an investigation by the Oklahoma City Police Department ("OCPD"). In March 2023, OCPD officers executed a search warrant at a two-bedroom residence located at 2237 Northwest 32nd Street in Oklahoma City. There, officers found Whitehead, his brother Tylin Childers, three of Whitehead's teenage nephews, and Whitehead's teenage sister. A search uncovered a handgun in the pocket of a jacket hanging over a closet door in one of the bedrooms. They arrested Whitehead and Childers, each of whom had prior felony convictions.

The Government charged Whitehead with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The jury found Whitehead guilty. The district court applied a sentencing enhancement for obstruction of justice and sentenced Whitehead to 87 months of imprisonment. Whitehead appeals.

II. Discussion

Whitehead raises three issues on appeal, challenging (1) the sufficiency of the evidence, (2) the enhancement for obstruction, and (3) the constitutionality of § 922(g)(1). We address the issues in order.

A. Sufficiency of the evidence

1. Standard of review

"We review the sufficiency of the evidence to support a conviction de novo to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the

crime beyond a reasonable doubt." *United States v. Stepp*, 89 F.4th 826, 831–32 (10th Cir. 2023) (internal quotation marks omitted). "In conducting this review, we consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses." *Id.* at 832 (internal quotation marks omitted). "Thus, our review is limited and deferential; we may reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

2. Constructive possession principles

To convict Whitehead "under § 922(g)(1), the Government had to prove, among other things, that he knowingly possessed . . . a firearm." *Id.* (internal quotation marks omitted). Although "[p]ossession may be actual or constructive," *id.*, there is no dispute that this case involves only constructive possession. "Constructive possession exists when a person, not in actual possession, knowingly has the power and intent at a given time to exercise dominion or control over an object." *Id.* (brackets and internal quotation marks omitted). "When a defendant has exclusive control over the premises where an object is found, a jury may infer constructive possession." *Id.* (internal quotation marks omitted). "But when a defendant jointly occupies the premises, the Government must show a nexus between the defendant and the firearm . . . ." *Id.* (internal quotation marks omitted). "That is, the Government must demonstrate the defendant knew of, had access to, and intended to exercise dominion or control over the contraband." *Id.* (brackets and internal

quotation marks omitted). "This may be proved by circumstantial as well as direct evidence." *Id.* (internal quotation marks omitted). "Multiple individuals may have constructive possession of the contraband; exclusive possession is not required." *Id.* at 833. "But the defendant's joint occupancy alone cannot sustain an inference of constructive possession." *Id.* (internal quotation marks omitted).

3. Whitehead's argument

Whitehead concedes that "the Government presented ample evidence that [he] knew about the gun and had access to it," but argues that "nothing presented to the jury supports a finding he intended to exercise control over it." Aplt. Opening Br. at 25. He contends the evidence is insufficient to support the Government's claim that the bedroom where the gun was found was solely his because at the time of the search, his sister was sleeping in there. He argues that at most, the evidence showed he jointly occupied that bedroom.

We disagree. We first summarize the relevant evidence and then explain why it was sufficient to support the conviction.

4. Trial evidence

Officer Harmon was the lead officer conducting the search. At trial, he testified that when he entered the house, he saw Whitehead at the back of the living room and "ordered [Whitehead] out," but Whitehead "did not comply." R. vol. III at 29:7. Whitehead then "ducked around the corner to the west and then later came back out into the living room." *Id.* at 29:8–9. The area he "ducked into" contained the southwest bedroom where the gun was found. *See id.* at 29:11–13; *see also id.*

at 33:10 (describing the bedroom where the gun was found as the "southwest bedroom"). Whitehead returned to the living room in "a matter of seconds." *Id.* at 45:19. Childers then emerged from the other bedroom. *See id.* at 32:2–10. There were also three teenagers who had been asleep on the living room couch, *see id.* at 29:16–17, 20–21, and "a female occupant asleep in the [southwest] bedroom," *id.* at 45:22.

After police removed all the occupants out of the house, they began to search it. They found Childers's property in the northeast bedroom. *Id.* at 32:22–24. Whitehead testified at trial that Childers was living at the house. *Id.* at 113:14–18. In the southwest bedroom, police found the following evidence: (1) a handgun sticking out of the pocket of a black jacket hanging over the closet door and a blue jacket hanging in the same closet with "a name patch on it that [said] 'Otis,'" *id.* at 35:6–15; (2) male clothing on the floor, *see id.* at 34:19–20; (3) "a letter addressed to Otis Whitehead at 2237 Northwest 32nd Street in Oklahoma City," which was the address of the house, and "dated 16th of December, 2022," *id.* at 34:10–12, which was several months before the arrest; (4) a letter addressed to Whitehead at 3008 Hillsdale Drive, *see id.* at 48:2–10, which is where Whitehead claimed he lived with his wife and children, *see id.* at 113:20–21; and (5) two documents bearing the name of Whitehead's twin brother, Otris Whitehead, *see id.* at 46:9 to 47:3. Police did not find any female clothing in the southwest bedroom. *See id.* at 35:2–3.

Officer Harmon testified that when asked, Whitehead told police that his address was "2237 Northwest 32nd Street in Oklahoma City." *Id.* at 38:5–10. When

confronted with this admission at trial, Whitehead said, "It was early that morning. They scared me." *Id.* at 120:23–25. When asked if he "gave [that] address to police as [his] residence," Whitehead claimed he could not "recall . . . because that's not my residence." *Id.* at 121:5–8. Whitehead testified that he had arrived at the house around 1:00 or 2:00 in the morning to visit his brother and play video games with his nephews and that he goes there "twice a week, or whenever [Childers] call[s]." *Id.* at 114:6–20.

The Government played for the jury a police patrol car video recording that captured a conversation between Whitehead and Childers while they were sitting in the back of the police car just after their arrest. The jury heard:

Childers: "Where was it at?"

Whitehead: "What?"

Childers: "Pistol."

Whitehead: "Ah bro that motherfucker was in the jacket in *my room*."

Childers: "They probably got it. I don't know."

Whitehead: "Hell yeah, they had to get it."

Suppl. R. vol. 1 at 1:14 to 1:19 (emphasis added); *see also* R. vol. III at 125:17–25, 127:14–18, 128:12–15 (Whitehead testimony confirming what he says on the video recording).

At trial, Whitehead admitted he said that the room where the gun was found was his, but he explained "that's not my room. I said 'my room,' but when I go over there, that — you could just say 'my room,' like, that's where I go, like, that's where

my little brother be at. If I do anything, like, I will put my jacket or something in there." *Id.* at 128:19–23. When asked if the "gun [was] hanging out of the pocket . . . because [he] didn't have time to hide it better when [he] ran into that hallway from police," *id.* at 130:3, 9–10, Whitehead answered, "No," *id.* at 130:11.

Childers also testified at trial. He said that he and Whitehead did not know what police had found in the house until they "got downtown." *Id.* at 62:5. But when the prosecution asked Childers if he made a jailhouse phone call on the day of the arrest during which he said he was upset Whitehead had brought the gun to the house, Childers said he could not recall. *See id.* at 62:25 to 63:4. The prosecution then played a recording of the call to impeach Childers's testimony. Afterwards, the following exchange occurred:

> Q (By [prosecutor]) Mr. Childers, you were upset that your brother had that gun.
>
> A I don't even — I never said anything about a firearm in that phone call.
>
> Q You said you didn't know why he had that shit with him?
>
> A I don't know what that shit is. I never knew what I went to jail for till I got down there.
>
> Q You said you guys don't keep stuff like that there, that's your safe spot?
>
> A Exactly. What is it? Why are we here? I didn't know what we are down here for. They never told us what we went to jail for.

Id. at 65:14–25.

After the recording of the call was played again, the prosecutor asked: "[Y]ou also said, 'why he had it with him,' correct?" *Id.* at 67:12–13. Childers responded: "Past tense. We were already in jail." *Id.* at 67:14–15. The prosecutor then asked:

"Mr. Childers, you were upset with your brother because he brought a gun to your safe spot?" *Id.* at 67:18–19. Childers answered: "I'm upset because they said we had something in our safe spot. They never told us what we were going to jail for." *Id.* at 67:20–21. When pressed, Childers testified that he "did not know" Whitehead had a firearm in the house. *Id.* at 68:7–11.

The defense called an OCPD forensic scientist as a witness. He testified that DNA testing of the gun and the black jacket was inconclusive because it detected a mixture of DNA from at least three individuals on the gun and from at least four individuals on the jacket. *See id.* at 96–97.

Lesley Gill also testified for the defense as follows: She had purchased the gun in question in February 2023. *See id.* at 102:19 to 103:2. Shortly afterward, she was planning on moving, so she asked her daughter, Janishia Shockley, to hold on to some of her belongings, including the gun. *See id.* at 103:9–24; *id.* at 108:23–25. Gill did not see the gun again and did not know what happened to it until she was notified that it had turned up at the house where police found it. *See id.* at 108:10–12; *id.* at 109:2–4. She thought Shockley had dated Childers, *see id.* at 106:22–24, and she did not know Whitehead, *see id.* at 104:17–18.

Whitehead testified that Shockley was Childers's girlfriend and lived at the house. *See id.* at 115:22–24; *id.* at 116:5–18. Whitehead claimed that Shockley brought the gun into the house. *See id.* at 116:25 to 117:5; *id.* at 129:1–4. He admitted he had several felony convictions. *See id.* at 117:18 to 118:9. He denied ever carrying, using, or possessing the gun. *See id.* at 117:6–9; *id.* at 118:10–12. But

he knew the gun was unloaded. *See id.* at 117:15–17; *id.* at 129:5–6. He presented utility bills with his name and the 3008 Hillside Drive address where he claimed he lived with his wife, dated several months after his arrest. *See id.* at 119:1–19; *id.* at 121:12–18. He denied he ever "ducked down that hallway" when police entered the house. *Id.* at 122:19–20. He admitted that the jacket with the "Otis" name patch was his. *See id.* at 129:7–13 (asking Whitehead about Government Exhibit 13, which is a picture of the "Otis" jacket, *see* Suppl. R. vol. II).[2] He knew Gill was Shockley's mother but did not know Gill. *See id.* at 130:19–21.

5. Analysis

The foregoing evidence, viewed in the light most favorable to the Government, was sufficient for the jury to find that Whitehead intended to exercise dominion or control over the gun. The jury reasonably could have found that, contrary to Whitehead's testimony, he in fact ducked out of sight for a few seconds toward the

[2] The Government argues that Whitehead's testimony here was an admission that the black jacket where the gun was found was his. But plainly the Government is mistaken because Government Exhibit 13 is a picture of the "Otis" jacket. The Government also argues that Whitehead made the same admission at two other points in his testimony. Our review of those portions of the testimony indicates that Whitehead made no such admission. In the first portion, the prosecutor asked: "So — and that black jacket, that was hanging in that room where your stuff was, right?" R. vol. III at 125:1–2. Whitehead asked: "Where my jacket was?" *Id.* at 125:5. The prosecutor then said "Yes," and then Whitehead said "Yes." *Id.* at 125:6–7. The prosecutor then asked: "And there's a gun in that jacket, right?" *Id.* at 125:8. Whitehead said "Yes." *Id.* at 125:9. We read this exchange as admitting that the gun was in the black jacket in the room where Whitehead's "Otis" jacket was, not as an admission that the black jacket was his. In the second portion of Whitehead's testimony that the Government points to, Whitehead confirmed that, in the patrol car, he said to Childers that the gun "was in the jacket." *Id.* at 127:16. He did not say that the jacket where the gun was found was his.

southwest bedroom where the gun was found and that it was hanging out of the black jacket's pocket because he did not have time to hide it better. This alone would have been sufficient evidence to support the required finding, particularly given that Whitehead, a convicted felon prohibited from possessing a gun, had motive to hide the gun. *See United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996) ("The kind of evidence that can establish dominion and control includes, for example, evidence that the defendant attempted to hide or to destroy the contraband . . . .").

But there is more. The jury could have reasonably found the southwest bedroom and the black jacket were Whitehead's, at least on the day the gun was seized if not every time he visited, based on (1) his statement, captured on the police car video, that it was his room; (2) his testimony that when he visits, "that's where I go. . . . If I do anything, like, I will put my jacket or something in there." R. vol. III at 128:21–23; and (3) the other physical evidence found in the room—the "Otis" jacket, additional male clothing (but no female clothing), and the letter addressed to Whitehead at the house's address. Finally, the jury reasonably could have found that Whitehead intended to exercise dominion and control over the gun based on the impeaching phone call in which Childers said he was upset that Whitehead had brought the gun to their "safe spot," *id.* at 67:20–21. Although Childers claimed that, when he made the call, he did not know what the police were charging them with or that Whitehead had brought the gun to the house, the jury could have readily found that effort not credible based on the evasiveness of his answers to the prosecutor's questions and his own question to Whitehead, as they sat in the patrol car—which

was prior to the impeaching phone call—about the status of the "[p]istol," Suppl. R. vol. 1 at 1:15.

In sum, the evidence was sufficient to support the conviction, and the jury did not need to resort to impermissible "speculation and conjecture that render[ed] its finding a guess or mere possibility," *United States v. Jones*, 49 F.3d 628, 632 (10th Cir. 1995) (internal quotation marks omitted).

B. Obstruction of justice enhancement

Whitehead argues that the district court erred in imposing a two-level enhancement for obstruction of justice pursuant to United States Sentencing Guideline § 3C1.1 based on a finding that he perjured himself at trial by testifying he did not try to get Shockley to take responsibility for the gun. We reject his argument.

Section 3C1.1 of the United States Sentencing Guidelines requires a two-level upward adjustment to a defendant's offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1 (2021).[3] Perjury can be the basis for such an enhancement. *Id.* § 3C1.1 cmt. 4(B). "To establish perjury, a district court must conclude the defendant (1) gave false testimony under oath, (2) about a material matter, and (3) the false testimony was willful and not the result of confusion, mistake or faulty memory." *United States v. Fernandez-Barron*, 950 F.3d 655, 657 (10th Cir. 2019)

[3] The computation of Whitehead's sentence was based on the 2021 edition of the Sentencing Guidelines.

(internal quotation marks omitted). Where, as here, "a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition." *United States v. Hawthorne*, 316 F.3d 1140, 1145 (10th Cir. 2003) (internal quotation marks omitted).

"In assessing the district court's interpretation and application of the Sentencing Guidelines, we review legal questions de novo and factual findings for clear error." *Fernandez-Barron*, 950 F.3d at 658 (internal quotation marks omitted). "A finding of fact is clearly erroneous only if it is without factual support in the record or if the appellate court, after reviewing all of the evidence, is left with a definite and firm conviction that a mistake has been made." *United States v. Craine*, 995 F.3d 1139, 1157 (10th Cir. 2021) (internal quotation marks omitted).

At trial, the Government asked Whitehead if he knew that the gun "was registered to [Gill] and [he] tried to get her daughter, Janishia Shockley, to take responsibility for [it]?" R. vol. III at 130:25 to 131:2. Whitehead acknowledged that the gun was "not registered to . . . Shockley," *id.* at 131:6–7, but denied that he had tried to get Shockley to take responsibility for it. The Government then asked Whitehead if he had placed "video calls" from jail to his friend, "Hatashia Bowman," and suggested that the purpose of those calls was "to try to get her to get . . . Shockley to take responsibility for that gun." *Id.* at 131:12–13, 20–22. As to the first call, Whitehead said he just wanted Shockley "to meet up with [his] lawyer to say

why that gun was even there." *Id.* at 131:23–24. To impeach Whitehead, the Government played the video recording of the first call, after which the following exchange took place:

> Q (By [prosecutor]) You-all thought because her wifi was hooked up there, you would be able to prove that was her gun, right?
>
> A No, that's the reason why the gun is there.
>
> Q You needed someone to claim that Janishia stayed there?
>
> A No, I needed Janishia, but she don't like this stuff, but why that gun was there.
>
> Q You started to talk about how this was going to happen —
>
> . . .
>
> Q And then you said, "Have Little South do it." That's — Little South is Tylin Childers?
>
> A His girl — yeah, to have him — to have his girlfriend meet up with my lawyer so this can not be — because I didn't try to possess or I didn't intend to do anything with that gun. That is her gun. The only reason that gun was over was because she brought it because her mom was moving.

Id. at 133:15 to 134:6.[4]

The Government then asked Whitehead whether, in a second video call to Bowman he placed later the same day as the first call, he tried "to get Janishia to take responsibility for the gun," *id.* at 134:15–16, suggesting that Whitehead "needed Ms. Bowman to help [him] get Janishia on board with [his] plan," *id.* at 134:25 to 135:1. Whitehead replied: "No, I needed her to tell the truth. If you listen to any of

[4] The video calls were not introduced into evidence and are not part of the record on appeal, so we base our review on the substance of those calls as portrayed through the Government's questions and Whitehead's answers.

my calls, I say I need Janishia to come tell the truth." *Id.* at 135:2–3. The Government then played the second video call, after which the following exchange took place:

> Q (By [prosecutor]) You wanted to know if she was okay with this, didn't you?
>
> A Yeah, going to get — going to make sure that Janishia meets up with my lawyer.
>
> Q You said, "It ain't even a lie," and then you laughed?
>
> A It ain't a — like, it ain't a lie I need you to do this. I need this done so —because y'all saying I'm trying to possess something or intent to possess something and I don't — I didn't even bring or nothing, other — the gun wouldn't have been there if it wouldn't for Janishia mom moving.
>
> Q And after you said, "It ain't even a lie," you laughed again and said, "I'm just playing."
>
> A I'm just trying — I was just trying to get Janishia to do what was — if you listen to those, I'm saying just tell her — what I need to talk to her, I'd tell her, just come tell the truth.
>
> Q And then next you said, "But do you got this."
>
> A Yeah, having Janishia, yeah, do what she — get her bill to show that she lived there, show that she brought it over there and everything, like do what's true, do what's right.

Id. at 135:17 to 136:11.

The Government then asked Whitehead if, in a third call made a couple of months later, Whitehead "demanded to talk to Janishia." *Id.* at 136:22. Whitehead agreed that he had. The Government then played the video call, which showed both Bowman and Shockley on the receiving end, after which the following exchange took place:

Q (By [prosecutor]) Mr. Whitehead, you wanted to know if it was true that Janishia was not going to take the rap for you?

A She gets mad at my brother and then wanted her not to do it. Instead of just coming to tell the truth, I told her she can't —

Q Many of my questions require a simple response, okay, so please respond to the question that is asked.

A Yes, sir.

Q And the question that I asked you is that you wanted to know whether or not it was true that she was not going to claim this gun, yes or no?

A That's not it.

Q Okay. And then Ms. Bowman tried to explain why she wouldn't do it and you quickly cut her off, didn't you?

A No, that's not it.

Q You said, "we didn't" — you didn't want to talk on this phone about it, did you?

A No, I didn't, because —

Q Because you knew the call was recorded?

A Yes. And I wanted her to just go tell the truth, not nothing else.

Q Mr. Whitehead, you didn't want Janishia's reasons about why she wouldn't do that for you recorded on a jail call —

A No, I was getting frustrated because I didn't know the reason because her and my brother probably argued and she, I'm not going to be around your brother, you know, is a typical relationship.

Q Mr. Whitehead, if this was her gun and you didn't possess it, it shouldn't matter what she says on that recorded call.

A Well, I guess not, but I was told not to talk about none of it because it could get me in trouble.

. . .

Q (By [prosecutor]) You wanted to know whether or not she was going to take that responsibility and when they tried to explain, you quickly cut them off?

A No.

Q You cut them off because you knew the call was recorded and you knew Janishia would say something that would get you in further trouble?

A No.

Q You did not want to start talking about why you needed her to take responsibility for it?

A No.

Id. at 137:20 to 138:25, 139:13–23.

At sentencing, the Government provided the district court with a transcript of these exchanges, relied on all of them, and specifically highlighted portions of the first and third exchanges. Whitehead's counsel argued that Whitehead "wasn't getting her to say things – or attempting to get her to say things that were untrue." *Id.* at 195:24–25. Instead, counsel argued, Whitehead "was trying to complete the story so we had the entire picture at trial through her testimony. That ultimately did not happen. But he was not putting words in her mouth. He was not telling her to say things that weren't already at least partly corroborated by the testimony of Ms. Gill." *Id.* at 196:1–5.

In ruling that the enhancement applied, the district court observed that Whitehead had testified under oath and found that "what was material in this instance was his – the testimony regarding the firearm registration and the ownership or possession or responsibility for that." *Id.* at 197:4–6. The court further found that "it appears from the transcript here defendant was less than forthcoming with respect to his conversations and exchanges with respect to Ms. Shockley and his effort to try to get her to take responsibility for that gun." *Id.* at 197:6–10. The court also did "not

believe, based on all that [it] recall[ed] and all that [it had] read [at the sentencing hearing] . . . that the testimony that Mr. Whitehead gave was the result of any confusion, mistake, or faulty memory." *Id.* at 197:11–14.

Whitehead first argues "'[t]he mere fact that a defendant testifies to his or her innocence and is later found guilty by the jury does not automatically warrant a finding of perjury.'" Aplt. Opening Br. at 28 (quoting *United States v. Markum*, 4 F.3d 891, 897 (10th Cir. 1993)). But the district court's explanation makes clear that the court did not impermissibly find Whitehead perjured himself simply because the jury found him guilty.

Whitehead also contends "the Government's argument the jail calls were attempts to shift blame to someone else is equally as plausible as Mr. Whitehead's explanation that he 'just wanted the truth,'" so it was clear error for the district court to find Whitehead perjured himself. *Id.* at 30. We disagree. The district court acted reasonably in interpreting the record as indicating that Whitehead had willfully lied when he testified that he never tried to get Shockley to take responsibility for the gun and that, in the video calls, he had attempted to shift possession or responsibility for the gun from Whitehead to Shockley. Two aspects of the testimony are especially supportive of that interpretation: (1) Whitehead's statement that "[i]t ain't even a lie," followed by him laughing and then saying, "I'm just playing," R. vol. III at 136:2–3 (internal quotation marks omitted); and (2) the evasiveness in his answers to the prosecutor's line of questioning regarding the third call, particularly those

concerning why he cut Bowman and Shockley off from explaining why Shockley would not take responsibility for the gun.

Whitehead maintains that he truthfully testified that the gun would not have been at the house but for Shockley bringing it there and he only wanted Shockley to say she had brought it there. But it was constructive possession—i.e., control—of the gun, not the reason for its mere presence at the house, that was at issue. Even if we were to agree with Whitehead that there were two "equally plausible interpretations of his testimony," Aplt. Opening Br. at 30, he cannot prevail on appeal. *See Craine*, 995 F.3d at 1157 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (brackets and internal quotation marks omitted)). The district court did not clearly err in finding that Whitehead perjured himself with respect to his efforts to deflect control of the gun from himself.

C. Constitutionality of § 922(g)(1)

Whitehead argues that § 922(g)(1) violates the Second Amendment under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). He states that he raises this issue solely "for preservation purposes, since his Second Amendment challenge remains precluded by *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023)." Aplt. Opening Br. at 33. In *Vincent*, this court concluded that *Bruen* did not disturb Tenth Circuit precedent upholding the constitutionality of § 922(g)(1) without regard to "the type of felony involved." 80 F.4th at 1202. However, the Supreme Court vacated *Vincent* and remanded for consideration in light of *United States v. Rahimi*,

602 U.S. 680 (2024). *See Vincent v. Garland*, 144 S. Ct. 2708 (2024). On remand, this court concluded that *Rahimi* did not "undermine the panel's earlier reasoning or result." *Vincent v. Bondi*, 127 F.4th 1263, 1264 (10th Cir. 2025). The court therefore "readopt[ed]" its "prior opinion." *Id.* at 1266. Thus, even after *Rahimi*, this circuit holds that § 922(g)(1) does not violate the Second Amendment. Whitehead's argument, therefore, fails on the merits.

III. Conclusion

We affirm Whitehead's conviction and sentence.

Entered for the Court

Allison H. Eid
Circuit Judge

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RE: 24-6062, United States v. Whitehead
Dist/Ag docket: 5:23-CR-00280-J-1

Dear Counsel:

Attached is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Steven W. Creager
Drew Davis
Jason M. Harley

CMW/at

IN THE

Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX B

Opening Brief for Otis Ray Whitehead, Jr.
(November 8, 2024)

No. 24-6062

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee**,**

v.

Otis Ray Whitehead, Jr.,
Defendant-Appellant**.**

On Appeal from the United States District Court
for the Western District of Oklahoma
District Court No. CR-23-280-J
The Honorable Bernard M. Jones, District Judge

Appellant's Opening Brief

Respectfully submitted,
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Oral Argument is Not Requested.

November 8, 2024

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Attachments

Attachment 1: Judgment

Attachment 2: Oral Rulings on Rule 29 Motions (R3: 85-86, 143-144)

Attachment 3: Oral Ruling on Obstruction of Justice Guideline Enhancement with Court's Guideline Calculation (R3: 196-198)

Table of Authorities

CASES

STATUTES

OTHER AUTHORITIES

RULES

Prior or Related Appeals

There are no prior or related appeals.

Statement of Jurisdiction

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal case under 18 U.S.C. § 3231. It entered written judgment on March 18, 2024. R1:132–138.[1] The Notice of Appeal was timely filed on April 1, 2024. R1:139; Fed. R. App. P. 4(b)(1)(A)(i) (setting 14-day time limit). The Court of Appeals has jurisdiction to consider this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] The record is cited as R[volume]:[page].

Statement of the Issues

(1) Was there sufficient evidence presented to the jury to support Whitehead's conviction for felon in possession of a firearm?

(2) Did the district court err in applying an enhancement for obstruction of justice under U.S.S.G. § 3C1.1?

(3) Should the conviction be vacated because 18 U.S.C. 922(g)(1) is unconstitutional?

Statement of the Case

Mr. Whitehead was charged with one count of possessing a firearm as a felon in violation of 18 U.S.C. §922(g)(1). He was convicted at a jury trial.

I. Officer Aaron Harmon describes the search leading to seizure of the gun and arrest of Mr. Whitehead.

At trial, Officer Harmon of the Oklahoma City Police Department testified first, describing how law enforcement discovered the gun at issue and the details surrounding the ensuing arrest of Mr. Whitehead. R3:22–54. He testified his department was investigating Mr. Whitehead,

which led to a search warrant at 2237 Northwest 32nd Street, where they believed Mr. Whitehead would be found. R3:26–27.

Officers executed the warrant on March 14, 2023. R3:28. Officer Harmon was the first one in the door. R3:28–29. Upon entering the house, he saw three teenagers on the couch in the living room, whom he believed to have been asleep, and Mr. Whitehead. R3:29. He described Mr. Whitehead as initially standing at the back of the living room at the north side of the house when he "ducked around the corner" briefly, then came back to the living room where he was immediately detained. R3:29, 31.

Officer Harmon surmised he had gone into the nearby "southwest bedroom," which he characterized as belonging to Mr. Whitehead. R3:33–34, 45. A man named Tylin Childers came out of the northeast bedroom. He "had active utilities," at the house and a search of that room revealed "his property." R3:32.

When officers entered the southwest bedroom, they encountered a teenaged female, asleep. R3:45, 53. They searched the room and found a

letter addressed to "Otis Whitehead" at 2237 Northwest 32nd Street in Oklahoma City dated December 16, 2022. R3:34. They also found two documents addressed to "Otris Whitehead," a family member of Otis's as well as mail addressed to "Otis Whitehead" at 3008 Hillside Drive. R3:46–48. "Male clothing" was on the floor, and, to Officer Harmon's recollection, no "female clothing." R3:34–35, 53.

In the closet was a jacket with a name patch, "Otis." R3:35. Hanging over the door of the same closet was a black jacket with a Taurus 9-mm handgun in its pocket (the gun charged in the indictment). R3:35–36. Officers placed both Mr. Whitehead and Childers, who both had prior felony convictions, under arrest. R3:37, 48. When an officer asked Mr. Whitehead for his address, he stated it was 2237 Northwest 32nd Street. R3:38.

DNA and fingerprint evidence were later collected from the gun. R3:38. Officer Harmon testified he learned the fingerprint evidence was "of no evidentiary value" and DNA evidence was inconclusive. R3:36. (A

lab analyst later testified there was DNA from at least three different people on the gun, but not enough to determine whose. R3:96–97. The jacket was also tested for DNA and those results showed a mixture of DNA from at least four unknown people and was considered inconclusive. R3:97.)

II. Tylin Childers testifies.

After Officer Harmon, the government next called Mr. Tylin Childers to the stand. R3:55-76. Childers testified he is thirty years old and Mr. Whitehead's half-brother (stating he was his "blood brother"; "daddy's son") and that he lives at 2237 Northwest 32nd Street. R3:55–57. He said he was home, sleeping, the morning of March 14, 2023. R3:57. The government asked if he knew officers discovered a pistol in a bedroom in his house with his brother's belongings, to which he replied, "They never stated anything, from my acknowledge [sic]. They didn't tell us anything." R3:58. The government then asked whether he had talked to his brother about what they found in the house, and he replied, "We

were in the county jail together. We went to county jail. We found out when I called out on the phone." R3:58–59. The government then asked, "So that is a 'yes'?" and Childers replied, "Yeah, we didn't know until we got downtown." R3:59. The government was then given permission, without objection, to treat Childers as a hostile witness. R3:59.

The government asked Childers if he could recall a phone call he made from jail that day after his arrest discussing "the gun [his] brother had" and he said he did not remember mentioning a firearm. R3:59–60. The government asked him if he was "upset with him for bringing that gun to the house" and he said he could not recall. R3: 60. It played one phone call in open court in attempt to impeach him. R3:60–61. It appears that on the call, Childers at one point said, "[W]hy he had it with him" and the government asked him if he was "upset with [his] brother because he brought that gun to your safe spot." R3:65. Childers replied, "I'm upset because they said we had something in our safe spot. They never

told us what we were going to jail for." R3:65. He testified he did not know his brother had a firearm in that house. R3:68.

On cross-examination, Childers testified he had been living at that house for about a year, and that his girlfriend, Janishia Shockley, lived with him. R3:69. He was not sure if Janishia knew there was a firearm in the house. R3:71. He testified Otris Whitehead never "stayed" at the house, though he had visited when he first moved in. Family members stayed the night sometimes, and his sister was at the house the morning he was arrested. R3:72–74.

III. Tylin Childers and Otis Whitehead discuss the gun in a recorded conversation in the back of a patrol vehicle.

The government played a recorded conversation between Otis Whitehead and Tylin Childers directly after they were arrested and placed together in the backseat of a patrol vehicle, R3:77–82:

> Childers: Where was it at?
>
> Whitehead: What?
>
> Childers: Pistol.

> Whitehead: That motherfucker was in the jacket
>
> in my room.[2]
>
> Childers: They probably got it, I don't know.
>
> Whitehead: Hell yeah, they had to get it.

Supp.R. at 1:58:24 to 1:58:40.[3]

IV. The government rests its case in chief and the district court denies Mr. Whitehead's Rule 29 motion.

The government its case in chief after it played the recording of Mr. Whithead talking with his brother. R3:82. The defense then made a Rule 29 motion for judgment of acquittal, admitting the government had established that Mr. Whitehead knew about the gun, but had provided no

---

[2] The recording can be hard to understand, but the government asked Mr. Whitehead, during his testimony (to be later detailed) in reference to the recording: "You said, 'That motherfucker was in the jacket in my room,' didn't you?" Mr. Whitehead answered, "Yes, that's what it says…" R3:125.

[3] The record will be supplemented with this recording as soon as possible after the filing of this brief today.

evidence he intended to possess it. R3:83–85. The government argued that a reasonable juror could find that, given that things in the room belonged to Mr. Whitehead and Officer Harmon's testimony, "a reasonable juror could find that Mr. Whitehead intended to possess the things that he did, along with his other belongings." R3:85. The district court denied the motion. R3:85–86.

IV. Lesley Gill testifies the gun was hers.

The defense called Lesley Gill to the stand, mother of Tylin Childers' girlfriend Janishia Shockley. R3:101-102. She testified the gun belonged to her; she had purchased it in February 2023 from Academy because she did not feel safe in her neighborhood. R3:101–03, 105. She asked Janishia to hold onto a few personal items, including the gun, while she moved in March of 2023. R3:103–104. Though Ms. Gill did not personally see her daughter take the gun, she testified Janishia took the gun and she had not seen the gun since then. R3:109–110.

V. Otis Whitehead takes the stand, denying possession of the gun and stating Jenishia brought it to the house.

Mr. Whitehead chose to testify on his own behalf. R3:112–140. He testified in March 2023 he was living at 3008 Hillside Drive with his wife and two children. R3:113. Mr. Childers, his brother, had been living at 2237 Northwest 32nd ("the house") for over a year, and "Jemiyo" and Janishia Shockley lived there as well. R3:113–114. Janishia was his brother's girlfriend and in March 2023 they had been together about a year. R3.115. She moved into the house at the same time as his brother. R3:116. There were only two bedrooms in the house and Janishia "stayed at the house, like, in that room or any room." R3:115–116. It was common for other people to spend the night at the house. R3:116. Sometimes Janishia would sleep with his brother in his room, sometimes in the other bedroom. R3:120.

March 14th was Spring Break for his nephews, and they had called him over to the house to play Call of Duty, a video game. R3:114. His

little sister, Kimberly Burnett, was there too. R3:115. He had fallen asleep after they were up playing games all night. R3:122.

Mr. Whitehead testified he knew there was a gun in the house—he saw it. R3:116. He said Janishia told him she brought it to the house. R3:117. He never used or carried it, but he knew it was not loaded since it was new. R3:117, 126. He never possessed it or intended to possess it. R3:118. He explained he does not like firearms because he had been shot before. R3:118.

The Assistant United States Attorney asked him about the conversation with his brother in the back of the patrol car. R3:125–126. Mr. Whitehead admitted his brother asked him about the pistol and wanted to know where it was. R3:125. He also admitted to answering his brother, "That motherfucker was in the jacket in my room." R3:125, 127. He explained that while he said "my room" it was not actually his room, he just called it "my room" as in, that's where he puts his "jacket or something" when he is at his little brother's house. R3:125–126, 128–130.

He admitted he had the following felony convictions: a 2011 felony conviction for trafficking in illegal drugs, a 2013 conviction for possession of drugs with intent to distribute, a 2011 conviction for false personation, a 2011 conviction for bail jumping, and a 2009 conviction for trafficking in illegal drugs. R3:117–118.

He verified two pieces of mail found at the house were addressed to him at his home at 3008 Hillside Drive in Del City, Oklahoma: one a bill dated June 14, 2023; the other dated July 21, 2023. R3:118–119, 121. The mail addressed to him at 32nd Street from December 2022 was from his uncle for Christmas for the kids. R3:124. The government asked him why he told police he lived at the 32nd Street address. R3:120. He explained it was so early and he was scared, but also said he didn't recall saying it because that is not his residence. R3:120–121.

He at first denied ever ducking down the hallway as Officer Harmon had testified, saying he actually just "hopped up" and "kind of ran back" because he didn't know what was going on. R3:122. He said there

were about seven police officers, and the kids were screaming. R3:122. His baby sister was sleeping in the bedroom where the gun was found. R3:123. He denied that bedroom was his room, but admitted he slept in that room when he and his "girl" were arguing. R3:123. When the officers came, he had been sleeping on the couch right by the front door. R3:124.

He admitted he had been taken to Grady County jail after he was arrested and, while he was held there awaiting trial, he made video calls to Janishia and also to a female friend named Hatashia Bowman multiple times from the jail, in attempt to get Janishia to reach out to his defense counsel to discuss how the gun ended up at the house in the first place. R3:131, 133, 135, 137. Three video calls were played in open court, but they do not appear to have been placed admitted into evidence. *See* R3:133, 135, 137. The AUSA characterized these calls as Mr. Whitehead trying to get Janishia to "take the rap for" him or "get on board" with his plan. R3: 135–39, but Mr. Whitehead repeatedly asserted that all he wanted was for Janishia to "tell the truth," and insisted Janishia brought

the gun over to the house because her mom was moving. R3:129, 134–36, 138.

After Mr. Whitehead's testimony, the defense rested. R3:140.

VI. The district court denies Mr. Whitehead's Rule 29 motion again and the jury convicts.

Mr. Whitehead reasserted his Rule 29 motion, arguing the government still failed to establish that Mr. Whitehead intended to possess the firearm found in a jointly occupied room. R3:143. The district court denied the motion. R3:144.

The government argued to the jury Mr. Whitehead constructively possessed the firearm. The district court instructed the jury on constructive possession, instructing that a person who

> knowingly has the power and intent at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.
>
> More than one person can be in possession of an object if each knows of its presence and has the power and intent to control it.

> In the situation where the object is found in a place (such as a room or a car) occupied by more than one person, you may not infer power and intent to exercise control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation, the Government must prove some connection between the particular defendant and the object demonstrating the power and intent to exercise control over the object.

R1:118; R3:159–160.

During deliberations, the jury sent out one note with two questions: 1) "Are we able to get an expanded definition of 'intent'?" and 2) "Are we able to get a portion of the transcript from the defendant's testimony"?" Ultimately, the jury found Mr. Whitehead guilty as charged. R1:124.

VII. When sentencing Mr. Whitehead, the district court enhanced his guidelines for obstruction of justice.

The United States Probation Office prepared a Presentence Investigation Report. R2:7. It recommended a 2-level enhancement for obstruction of justice to the guideline calculation under U.S.S.G. § 3C1.1. R2:13. Mr. Whitehead's advisory guidelines range with the obstruction

enhancement was 84–105 months' imprisonment. R2:24. The probation officer stated that "trial testimony transcripts" and "additional audio recordings… clearly indicate the defendant was obstructing justice by coercing others to take responsibility for the firearm." R2:27. Without the enhancement, his guidelines range would have been 70–87 months.

At sentencing, the court found Mr. Whitehead perjured himself during his testimony and therefore the enhancement was appropriate. *Id.* at 196–98. It found the following portions of Mr. Whitehead's trial testimony constituted perjury, R3:197:

> Q: But you actually—you knew that this gun was registered to [Ms. Gill] and you tried to get her daughter, Janishia Shockley, to take responsibility for that gun?
>
> A: No.
>
> Q: You never did that?
>
> A: No.

R3:130–31.[4]

> Q: You said, "It ain't even a lie," and then you laughed?
>
> A: It ain't a—like, it ain't a lie I need you to do this. I need this done so—because y'all saying I'm trying to possess something or intent to possess something and I don't—I didn't even bring or nothing, or there—the gun wouldn't have been there if it wouldn't for Janishia mom moving.
>
> Q: And after you said, "It ain't even a lie," you laughed again and said, "I'm just playing."
>
> A: I'm just trying—I was just trying to get Janishia to do what was—if you listen to those, I'm saying just tell her—what I need to talk to her, I'd tell her, just come tell the truth.
>
> . . .
>
> Q: You tried to get Janishia on board, even into October of this year, didn't you?

---

[4] These portions of testimony were referenced during sentencing using page numbers that don't align with the pagination in the Record on Appeal. At sentencing, the government used excerpts of Mr. Whitehead's trial testimony that used different page numbers. The page and line numbers used by the court at sentencing have been cross-referenced by counsel and presented here using appeal record page numbers for clarity and continuity.

> A: I don't know what you mean by "on board." I wanted her to tell the truth.

R3:135–36.

Defense counsel objected to the enhancement, noting Mr. Whitehead was simply "trying to have Ms. Shockley come talk to [counsel] to discuss [how the gun got into the room], to see if that would be part of a defense at trial. But he wasn't getting her to say things—or attempting to get her to say things that were untrue. He was trying to complete the story so we had the entire picture at trial through her testimony." R3:195–96. The district court found Mr. Whitehead's testimony "was less than forthcoming with respect to his conversations and exchanges with respect to Ms. Shockley and his effort to try to get her to take responsibility for that gun" and that his testimony was not "the result of any confusion, mistake, or faulty memory." R3:197.

The district court imposed a sentence of 87 months. R3:213; *see also* R1:132. It stated that 87 months "would be the same [sentence] that I

would impose with or without the disputed enhancement[.]" R3:213. This appeal follows.

Summary of the Argument

The evidence presented at trial was insufficient for the jury to conclude beyond a reasonable doubt that Mr. Whitehead constructively possessed a firearm. While the government may have proven that Mr. Whitehead knew a gun was in the jacket hanging in the bedroom, it did not prove he intended to exercise control over the gun. The testimony established at most a case of joint occupancy of that room which is not enough to establish intent to control a gun in a pocket in a jacket in that room even though he knew it was there. The conviction should be reversed accordingly.

Enhancing Mr. Whitehead's guidelines for obstruction of justice requires remand. Mr. Whitehead maintains he did not perjure himself on the stand, and the court's conclusion to the contrary is not supported by the record.

[For preservation:] Finally, Mr. Whitehead's conviction should be vacated, because that statute is plainly unconstitutional.

Argument

I. The government presented insufficient evidence that Mr. Whitehead constructively possessed the firearm.

To prove Mr. Whitehead constructively possessed the firearm as it claimed, it was required to show Mr. Whitehead not only had the power, but the intent to exercise control over that gun. This it did not do.

A. Issue raised and ruled on.

Mr. Whitehead made Rule 29 Motions for a Judgment of Acquittal on two occasions: at the close of the government's case-in-chief and at the close of the defense's case, arguing both times the government had failed to establish the requisite intent. R3:83–85, 143. The issue is thus preserved.

B. Standard of Review

This Court reviews de novo whether a conviction is supported by sufficient evidence. *United States v. Stepp*, 89 F.4th 826, 831 (10th Cir.

2023). In reviewing a sufficiency of the evidence claim, this Court must determine whether, "if viewing the evidence and the reasonable inferences therefrom in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Benford*, 875 F.3d 1007, 1014 (10th Cir. 2017) (citing *United States v. Gallant*, 537 F.3d 1202, 1222 (10th Cir. 2008)). Reversal is warranted "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable about." *Stepp*, 89 F.4th at 832 (quoting *United States v. Griffith*, 928 F.3d 855, 868–69 (10th Cir. 2019)).

In reviewing the evidence, this Court does not "weigh conflicting evidence or consider witness credibility, as these duties are delegated exclusively to the jury." *United States v. Evans*, 318 F.3d 1011, 1018 (10th Cir. 2003). But "there must be more than 'a mere modicum' of evidence. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979) (internal quotation marks omitted). "The evidence must be substantial, raising more than a mere

suspicion of guilt." *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (internal quotation marks omitted). The standard of review requires "more than speculation." *United States v. Garcia Rodriguez*, 93 F.4th 1162, 1165 (10th Cir. 2024); a conviction cannot be upheld if it was "'obtained by piling inference upon inference.'" *Id.* at 1066 (quoting *United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998)).

C. The Government presented no evidence that Mr. Whitehead intended to exercise control of the firearm.

To secure a conviction under 18 U.S.C. 922(g)(1), the government was required to prove, among other things not at issue, that Mr. Whitehead knowingly possessed the firearm. Possession of a firearm can be actual or constructive. *United States v. Little*, 829 F.3d 1177, 1181 (10th Cir. 2016). At trial, both parties agreed this is a constructive possession case. R3:165, 170. "Constructive possession is established when a person, though lacking such physical custody, still has the power *and intent* to exercise control over the object." *Henderson v. United States*, 575 U.S. 622, 626 (2015) (emphasis added). "When a defendant has exclusive

control over the premises where an object is found, 'a jury may infer constructive possession.'" *Stepp*, 89 F.4th at 832 (quoting *Little*, 829 F.3d at 1183). "But when a defendant jointly occupies the premises, the Government must 'show a nexus between the defendant and the firearm[.]'" *Id.* (quoting *Benford*, 87 F.3d at 1015). This means the Government "must demonstrate the defendant knew of, had access to, and intended to exercise dominion or control over the contraband." *Id.* (quoting *United States v. Johnson*, 46 F.4th 1183, 1187 (10th Cir. 2022)). It is possible for multiple people to have constructive possession of a firearm, but "'joint occupancy alone' cannot sustain an inference of constructive possession." *Id.* (quoting *United States v. Hishaw*, 235 F.3d 565, 571 (10th Cir. 2000)).

The government claimed the gun was found in what it contended could only be Mr. Whitehead's room, and therefore it had proven he intended to control it. R3:165–167. But nothing in Mr. Childers' testimony hinted the room was Mr. Whitehead's. Recall his testimony that he lived there with his girlfriend and that family members also stayed at his

house at times. Indeed, on the night thereof, the evidence showed definitively that Mr. Whitehead's sister slept in the room. While Mr. Whitehead referred to the room as "my room" in the recorded conversation with his brother, he explained he did not mean that it was truly "his room," but a place where he laid his stuff when he came over. That this is so is supported by the testimony of Mr. Childers, and makes sense. He explained he stayed in the room sometimes, if he and his wife were arguing, but that his home was in Del City. That does not make the room his, or at least not exclusively his. And multiple people were in the home the morning in question.

The testimony established at most a case of joint occupancy of that room. And that is not enough, under the law, to establish intent to control a gun in a pocket in a jacket in that room—even one that he knew was there.

The jury could only have inferred such intent by sheer speculation. But that is not allowed. This Court "cannot permit speculation to

substitute for proof beyond a reasonable doubt. Even though rational jurors may believe in the likelihood of the defendants' guilt . . . they may not convict on that belief alone." *United States v. Jones*, 49 F.3d 628, 632–33 (10th Cir. 1995). And jurors may "not engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility." *Id.* at 632 (quoting *Sunward Corp. v. Dun & Bradstreet, Inc.,* 811 F.2d 511, 521 (10th Cir. 1987)).

While the Government presented ample evidence that Mr. Whitehead knew about the gun and had access to it, nothing presented to the jury supports a finding he intended to exercise control over it. Mr. Whitehead's conviction could only be based on multiple inferences and speculation on the jury's part. The evidence elicited was insufficient to infer her intended to possess that firearm; his conviction must be vacated accordingly.

II. The district court erred in applying a sentencing enhancement for Obstruction of Justice under U.S.S.G. § 3C1.1.

A. Issue raised and ruled on.

Mr. Whitehead objected to the PSR's recommendation of the U.S.S.G. § 3C1.1 enhancement, both in his sentencing memorandum and during sentencing. R1:129–301; R3:195. After hearing arguments from both parties, the district court overruled the objection, deciding Mr. Whitehead had perjured himself while testifying at trial, that said testimony was material, and that it was not the result of "any confusion, mistake, or faulty memory." R3:196–98.

B. Standard of Review.

"In assessing 'the district court's interpretation and application of the Sentencing Guidelines,'" this Court "review[s] legal questions de novo and factual findings for clear error." *United States v. Fernandez-Barron*, 950 F.3d 655, 658 (10th Cir. 2019) (quoting *United States v. Mollner*, 643 F.3d 713, 714 (10th Cir. 2011)). In reviewing factual findings for clear error, this Court "reverse[s] only if the finding lacks 'factual support in

the record' or if [it is] 'left with a definite and firm conviction that a mistake has been made.'" *United States v. Yellowhorse*, 86 F.4th 1304, 1310 (10th Cir. 2023) (quoting *United States v. Craine*, 995 F.3d 1139, 1157 (10th Cir. 2021)).

C. Obstruction of Justice Enhancement.

The district court determined that a two-level enhancement for obstruction of justice was appropriate. The enhancement guideline states:

> [i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct, or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. This can be applicable if a defendant "commit[s], suborn[s], or attempt[s] to suborn perjury." *Id.* cmt. 4(b).

Once a defendant objects to an enhancement, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do

the same, under the perjury definition we have set out." *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). "'To establish perjury, a district court must conclude the defendant (1) gave false testimony under oath, (2) about a material matter, and (3) the false testimony was willful and not the result of confusion, mistake or faulty memory.'" *Fernandez-Barron*, 950 F.3d at 657 (quoting *United States v. Rodebaugh*, 798 F.3d 1281, 1300 (10th Cir. 2015)).

D. A defendant's testimony in his defense is not inherently false simply because the jury returns a conviction.

"The mere fact that a defendant testifies to his or her innocence and is later found guilty by the jury does not automatically warrant a finding of perjury. An automatic finding of untruthfulness, based on the verdict alone, would impinge upon the constitutional right to testify on one's own behalf." *United States v. Markum*, 4 F.3d 891, 897 (10th Cir. 1993) (internal citations omitted). "[His] testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal

liability or prove lack of intent—not every testifying defendant who is convicted qualifies for a § 3C1.1 enhancement." *Dunnigan*, 507 U.S. at 87–88.

The applicability of the obstruction enhancement turns on conflicting characterizations of Mr. Whitehead's conversations with and about Janishia Shockley. The government referred to these calls as Mr. Whitehead trying to get Janishia to "take responsibility for that gun[.]" R3:131. That is technically what Mr. Whitehead was trying to do: have Janishia talk to defense counsel to explain the gun was there because she put it there. But in the midst of a cross-examination trying to paint Mr. Whitehead as someone who attempts to blame others for his actions, he pushed back against this line of inquiry, explaining he just wanted her to tell the truth.

"Some innocent defendants are bad witnesses, ineloquent, contradictory or nervous, and their testimony may produce false positives."[5] Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minn. L. Rev. 1327, 1333 (2009) (citing *Wilson v. United States*, 149 U.S. 60, 66 (1893) ["Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him."]). At best, the Government's argument the jail calls were attempts to shift blame to someone else is equally as plausible as Mr. Whitehead's explanation that he "just wanted the truth." When presented with these two equally plausible interpretations of his testimony, it is clear error to find he perjured himself.

---

[5] "Criminal adjudication is a sorting process—the judicial system attempts to determine which defendants are guilty and which are not. It is a human system, and errors are inevitable. There are two types of errors: false positives, where an innocent person is found guilty; and false negatives, where a guilty person is set free." *Making Defendants Speak* at 1330 (internal citations omitted).

Because Mr. Whitehead was simply explaining his attempts at getting Janishia to speak to counsel so that he could adequately prepare a complete defense, the obstruction enhancement was improperly applied. "A verdict of guilty means only that guilt has been proved beyond a reasonable doubt [assuming there was sufficient evidence, *see* Part I], not that the defendant has lied in maintaining his innocence." *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973).

E. Even though the ultimate sentence imposed fell within the guidelines range with or without the enhancement, remanding for resentencing is appropriate.

If the court finds that the sentencing enhancement was improperly applied, it must then determine if remand is appropriate. *United States v. Rosales-Garcia*, 667 F.3d 1348, 1355 (10th Cir. 2012). Mr. Whitehead was sentenced to an 87-month term of imprisonment. This sentence falls within his Guidelines range with the § 3C1.1 enhancement (84–105 months) or without (70–87 months). At sentencing, the district court

stated that 87 months "would be the same [sentence] that I would impose with or without the disputed enhancement[.]" *Id.* at 213.

This Court has previously held that after a district court applies an improper offense level or misapplies an enhancement, remand is warranted, "[u]nless the district court makes it clear during the sentencing proceeding that the sentence would be the same under either of the applicable Guideline ranges[.]" *United States v. Urbanek*, 930 F.2d 1512, 1516 (10th Cir. 1991). Below, the district court clearly stated it intended to impose the same sentence regardless of how it ruled on the enhancement. But this Court has also "rejected the notion that district courts can insulate sentencing decisions from review by making such statements." *United States v. Gieswein*, 887 F.3d 1054, 1062–63 (10th Cir. 2018). "When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-*

Martinez v. United States, 578 U.S. 189, 198 (2016). This court should remand so the court may consider sentencing absent its error in calculation.

II. [For preservation:] The federal felon in possession statute is plainly unconstitutional as written and as applied.

Mr. Whitehead's conviction should also be vacated because 18 U.S.C. § 922(g)(1) is unconstitutional under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Mr. Whitehead raises this issue for preservation purposes, since his Second Amendment challenge remains precluded by *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). This Court's review of this issue is for plain error. *United States v. Martinez-Torres*, 795 F.3d 1233, 1236 (10th Cir. 2015).

Mr. Whitehead is a member of the "people" covered by the Second Amendment. *Bruen* requires the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19. To do this, "[a] court must ascertain whether the new law is 'relevantly

similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *United States v. Rahimi*, 602 U.S. ___, 144 S.Ct. 1889, 1898 (2024) (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 144 S.Ct. at 1898 (citing *Bruen*, 597 U.S. at 29). There is no historical law that imposes a burden comparable to § 922(g)(1). As applied, banning an individual like Mr. Whitehead, even with his criminal record, from possessing firearms for life does not comport with history.

Mr. Whitehead contends if *Vincent* is overturned, he will be able to meet each prong of plain error review, as conviction under a plainly unconstitutional statute is prejudicial and merits reversal. *See Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016) ("A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.") (quotation omitted)).

Conclusion

For the foregoing reasons, this court should vacate Mr. Whitehead's § 922(g)(1) conviction.

Statement Regarding Oral Argument

Mr. Whitehead does not request oral argument because counsel believes the matter can be assessed on the briefs.

Respectfully submitted,

s/ *Laura K. Deskin*
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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook font, Size 14.

s/ *Laura K. Deskin*

Before the United States Court of Appeals
for the Tenth Circuit

United States of America v. Otis Ray Whitehead, Jr.

Case No. 24-6062

ATTACHMENT 1

Judgment in a Criminal Case
filed March 18, 2024

W.D. Okla. CR-23-280-J

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA
v.
OTIS RAY WHITEHEAD, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-23-00280-001

USM Number: 71928-510

JUSTIN PATRICK HILL
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) ONE (1) OF THE INDICTMENT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) and 924(a)(8)	FELON IN POSSESSION OF A FIREARM	03/14/2023	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

MARCH 18, 2024
Date of Imposition of Judgment

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

March 18, 2024
Date Signed

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
EIGHTY-SEVEN (87) MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

It is recommended the defendant be designated to FCI El Reno,

It is recommended the defendant participate in RDAP if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **THREE (3) YEARS**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3A — Supervised Release

Judgment— 4 of 7

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B(Rev. 09/19) Judgment in a Criminal Case
Sheet 3B— Supervised Release

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, drug trafficking, stolen, fraudulently obtained or counterfeit checks, financial documents, or unreported assets at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

2. The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall actively participate in the treatment program until successfully discharged from the program or until the probation officer has excused the defendant from the program. The defendant shall totally abstain from the use of alcohol and other intoxicants. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The defendant shall contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

3. The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

4. The defendant shall not associate with any known gang members; however, some contact may be permitted at the discretion of the U.S. Probation Office (*e.g.,* family members).

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated 02/16/2024 (doc. no. 81).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Before the United States Court of Appeals
for the Tenth Circuit

United States of America v. Otis Ray Whitehead, Jr.

Case No. 24-6062

ATTACHMENT 2

Oral Rulings on Rule 29 Motions
(R3: 85-86, 143-144)

W.D. Okla. CR-23-280-J

evidence of him wearing this black jacket, we would have known about it.

So I don't think the government has met its burden on demonstrating intent to possess the firearm. So for that reason, we would move for judgment of acquittal.

THE COURT: Thank you, Mr. Hill.

Mr. Harley, response?

MR. HARLEY: Yes, Your Honor. We believe that viewed in a light most favorable to the government, that a reasonable juror could find the evidence sufficient to obtain a conviction in this case.

Regarding the intent element, we believe that a reasonable juror could easily find that, given all of the things contained in that bedroom belonging to Mr. Otis Whitehead, in combination with Mr. Harmon's testimony about the investigation and putting him there, that a reasonable juror could find that Mr. Whitehead intended to possess the things that he did, along with his other belongings.

THE COURT: Thank you so much, Mr. Harley.

As you-all know, in considering a motion for judgment of acquittal, this Court views the evidence in the light most favorable to the government and asks whether a reasonable juror could find the defendant guilty beyond a reasonable doubt of the crime charged.

The Court considers both the direct and the circumstantial

evidence together with the reasonable inferences that can be drawn from that evidence.

The Court does not weigh conflicting evidence or consider the credibility of witnesses, but determines whether the evidence, if believed, would establish each element of the crime.

Based on this standard, the motion is denied.

Now, Mr. Hill, let me inquire. You-all -- I presume you-all intend to put on evidence here?

MR. HILL: Yes, Your Honor, I have two witnesses that are here.

THE COURT: All right. Mr. Whitehead, as you recall, when we discussed at pretrial, I shared with you that at some point at the conclusion of the government's case, I would advise you and ultimately inquire as to whether you intended to testify in this matter.

Before your defense ends its presentation of evidence, I want to make sure that you understand that you have an absolute right to testify or not to testify at trial. That is a choice that you, alone, must make.

And so, first of all, having shared that here today, and even before when we had that colloquy yesterday, let me ask, do you understand the constitutional right to testify or not to testify?

THE DEFENDANT: Yes.

exited the courtroom.

At this time, I will entertain any motions.

MR. HILL: Your Honor, we would reassert our Rule 29 motion from earlier at this point. Again, I believe the government still has failed to establish the intent that's required under the elements looking at jury instruction 1.31.

Again, this is a matter of joint occupancy, multiple people in there, so this requires more than mere presence or control over the specific room that we're talking about in this case.

I think they've presented adequate evidence of presence, control and, obviously, we've conceded knowledge at this point, based on the evidence we've presented, but I don't think there's any evidence that supports a finding that Mr. Whitehead intended to possess that firearm, even in the light most favorable to the government, so for those reasons, we would reaffirm our Rule 29 motion.

THE COURT: Thank you, Mr. Hill.

Mr. Harley.

MR. HARLEY: Your Honor, for the same reasons previously articulated, we believe that a reasonable juror could find Mr. Whitehead guilty based on the evidence presented today and any reasonable inferences therefrom.

THE COURT: Thank you so much.

As you-all know, in considering a motion for judgment of

acquittal, the Court views the evidence in the light most favorable to the government and asks whether a reasonable juror could find the defendant guilty beyond a reasonable doubt of the crime charged.

The Court considers both the direct and the circumstantial evidence, together with the reasonable inferences that can be drawn from that evidence. This Court does not weigh conflicting evidence or consider the credibility of witnesses, but determines whether the evidence, if believed, would establish each element of the crime. And based upon this standard, the motion is denied.

Let me -- it's my understanding that you-all have received copies of your jury instructions. Are you prepared to finalize those or would you like more time to review?

MR. HARLEY: No, Your Honor, we're ready to finalize them.

THE COURT: Mr. Hill?

MR. HILL: I'm prepared, Your Honor.

THE COURT: All right.

Counselors, Mr. Seidel wants to visit with you-all briefly just to go over just a few minor changes, so we'll just go off the record.

(Discussion off the record.)

THE COURT: All right. We are back on the record.

You-all have had an opportunity to visit with Mr. Seidel

Before the United States Court of Appeals
for the Tenth Circuit

United States of America v. Otis Ray Whitehead, Jr.

Case No. 24-6062

ATTACHMENT 3

Oral Ruling on Obstruction of Justice Guideline Enhancement with Court's Guideline Calculation
(R3: 196-198)

W.D. Okla. CR-23-280-J

He was trying to complete the story so we had the entire picture at trial through her testimony. That ultimately did not happen. But he was not putting words in her mouth. He was not telling her to say things that weren't already at least partially corroborated by the testimony of Ms. Gill. And so we think, for those reasons, that this shouldn't apply.

I would also note, to the second prong talking about coercion, there is no indication there was any intimidation, any threat, anything like that in order -- in order to try and get her to come testify or to even meet with me.

And I think what speaks to that even more is the fact that she never did come and meet with me. So there was no pressure to do anything because she didn't actually end up doing anything.

And so for those reasons we think the enhancement shouldn't apply in this case.

THE COURT: Thank you so much.

As I think about the enhancements here and -- the objections, I should say, and the enhancement set forth in Section 3C1.1, noting, of course, the government's two-prong approach to this, I think -- or to the application of the enhancement, I think that the stronger position here, based on what I've heard here today, is with respect to defendant's own perjury.

I think, as clearly set forth in page 22, beginning at

line 5, as noted by Mr. Harley -- first of all, I note that the defendant was, indeed, under oath. He was testifying in court.

And what was material in this instance was his -- the testimony regarding the firearm registration and the ownership or possession or responsibility for that, which it appears from the transcript here defendant was less than forthcoming with respect to his conversations and exchanges with respect to Ms. Shockley and his effort to try to get her to take responsibility for that gun.

I do not believe, based on all that I recall and all that I've read here today, that this was -- that the testimony that Mr. Whitehead gave was the result of any confusion, mistake, or faulty memory.

And so, for that reason, I do believe -- again, relying on the specifics on page 22 of the transcript, beginning at line 5 and as articulated by the government here today, I do believe that the enhancement is properly applied here today.

Because I'm applying -- or believe that the standard has been met so as to apply that enhancement with respect to defendant's own perjury, I see no need to venture down the additional prong or consider the additional prong with respect to the unlawfully influencing of others.

And so, for these reasons, the Court will sustain the government's objection and will apply the enhancement pursuant

to Section 3C1.1 based on, again, defendant's own perjury.

So having made those rulings, let me ask: Are there any other discussions or considerations with respect to the objections?

Mr. Harley?

MR. HARLEY: No, your Honor.

THE COURT: Mr. Hill?

MR. HILL: No, your Honor.

THE COURT: All right.

And so at this point in time I am going to adopt the PSR as my findings on all undisputed factual matters, resulting in an offense level of 22, a Criminal History Category of VI, and a guideline range of imprisonment of 84 to 105 months.

Do the parties agree that the guidelines have been calculated accurately?

MR. HARLEY: Yes, your Honor.

MR. HILL: Yes, your Honor.

THE COURT: All right. I have considered various departure guidelines and related application notes but do not believe departure appropriate in this instance. Consequently, I will not be exercising my discretion in that regard, but I will entertain a request for variance in deciding an appropriate sentence.

Neither side has indicated that they intend to offer any evidence. And so absent an announcement to the contrary, let

IN THE

Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX C

Opening Brief for the Government
(January 8, 2025)

No. 24-6062

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

V.

OTIS RAY WHITEHEAD, JR., DEFENDANT-APPELLANT.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE BERNARD M. JONES
DISTRICT JUDGE

D.C. NO. CR-23-280-J

BRIEF OF PLAINTIFF-APPELLEE
ORAL ARGUMENT NOT REQUESTED

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Sentencing Guidelines

Prior or Related Appeals

There are no prior or related appeals.

Jurisdictional Statement

On July 5, 2023, a federal grand jury returned a one-count indictment charging Otis Ray Whitehead, Jr., with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (ROA, Vol. 2, at 10.)[1] On December 6, 2023, a jury found Mr. Whitehead guilty of that charge. (ROA, Vol. 1, at 124.) On March 18, 2024, the district court, in a final order, sentenced Mr. Whitehead to eighty-seven (87) months of imprisonment, three (3) years of supervised release, and imposed a $100 special assessment. (*Id*. at 132–137.) The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Mr. Whitehead filed a notice of appeal on April 1, 2024. (*Id*. at 139.) This Court has jurisdiction to consider the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Statement of the Issues

1. Whether the government presented sufficient evidence to support Mr. Whitehead's conviction for being a felon in possession of a firearm?

2. Whether the district court erred in applying a sentencing enhancement pursuant to United States Sentencing Guidelines (USSG) § 3C1.1 for obstruction of justice?

[1] Citations are to documents included in the record on appeal, identifying the volume and page number where they are located, e.g., "ROA, Vol. ___, at ___." *See* 10th Cir. R. 28.1(A)(2).

3. Whether Mr. Whitehead's conviction should be vacated pursuant to his claim that 18 U.S.C. § 922(g)(1) is unconstitutional.

Statement of the Case

I. The March 14, 2024 Search Warrant.

In January 2023, Mr. Whitehead and his brother, Tylin Childers, were the subject of an Oklahoma City Police Department (OCPD) drug investigation. (ROA, Vol. 2, at 11.) OCPD conducted three controlled purchases of cocaine from Mr. Whitehead during this investigation and ultimately obtained a state search warrant for two residences believed to be used by Mr. Whitehead and his brother. (*Id.*) One of those residences was located on Northwest 32nd Street in Oklahoma City, and both Mr. Whitehead and Mr. Childers, were present at that house when police arrived on March 14, 2023, to execute the search warrant. (*Id.*)

After Mr. Whitehead and his family members were removed from the house, officers executed the search warrant, and they located a Taurus G2C 9mm pistol in the pocket of a jacket that was hanging from a closet door in the southwest bedroom. (*Id.*) Officers also located another jacket in that same closet which bore the name "Otis" as well as other items of dominion and control for Otis Whitehead, Jr., in that same southwest bedroom. (*Id.*)

II. The Trial Testimony of OCPD Officer Aaron Harmon.

At trial, the government called OCPD officer (Ofc.) Aaron Harmon as the first witness in its case-in-chief. (ROA, Vol. 3, at 22–36.) Ofc. Harmon explained how OCPD had been investigating Mr. Whitehead, which included conducting surveillance, and that they believed they would find Mr. Whitehead at a residence located at 2237 Northwest 32nd Street, Oklahoma City, Oklahoma. (*Id*. at 23–24.) Ofc. Harmon was the affiant for the search warrant for that residence and, as a member of the entry team, he was also the first OCPD member inside the residence that morning. (*Id*. at 25–26.)

As Ofc. Harmon entered the house, he saw Mr. Whitehead standing near the back of the living room and he ordered Mr. Whitehead out. (*Id*. at 26.) Instead of complying, Mr. Whitehead "ducked around the corner to the west and then later came back out into the living room shortly thereafter." (*Id*.) During Ofc. Harmon's testimony, the government introduced several photographs of the house into evidence and Ofc. Harmon described in further detail Mr. Whitehead's movements. (*Id*. at 27–30.) Ofc. Harmon explained how Mr. Whitehead could have easily moved from his location into that southwest bedroom where the gun was

ultimately found. (*Id.*)

Ofc. Harmon testified about how law enforcement believed that Mr. Whitehead used this southwest room because of the mail found inside that southwest bedroom that was addressed to Mr. Whitehead, the male clothing located throughout the room, the jacket in the closet with the name "Otis" on it, and because Mr. Whitehead told police that morning that his address was 2237 Northwest 32nd Street in Oklahoma City. (*Id.* at 30–31, 35). Ofc. Harmon was also present in that southwest bedroom when officers found the Taurus pistol sticking out of the pocket of the jacket that hung on the closet door. (*Id.* at 32–33.)

Ofc. Harmon further testified as to how law enforcement knew this southwest bedroom was not used by Mr. Childers, explaining that law enforcement saw Mr. Childers coming from the northeast bedroom that morning and, based on his personal effects contained in there, it was clear that he used the northeast bedroom. (*Id.* at 29–30.) Additionally, Mr. Whitehead's later testimony verified this. (*Id.* at 120.)

III. The Trial Testimony of Tylin Childers.

The government called Tylin Childers as the second witness during the trial. From the outset, the district court was concerned with Mr.

Childers' behavior and respect for the proceedings. (ROA, Vol 3., at 53.) At one point, the district judge called Mr. Childers' court-appointed attorney to the bench to inquire about Mr. Childers' demeanor and on another occasion, the Court admonished Mr. Childers by reminding him "this is a Court of law." (*Id*. at 53–54, 56–57.)

From the outset, Mr. Childers evaded counsel's questions and the government counsel was granted permission by the district court to treat Mr. Childers as a hostile witness. (*Id*. at 59.) As the questioning continued, Mr. Childers was asked about a March 14, 2023 phone call he made from the Oklahoma County jail, shortly after his arrest, where he discussed the pistol found at his house. (*Id*. at 59–60.) The Court allowed government counsel to play that call in front of the jury for purposes of impeaching Mr. Childers' testimony. (*Id*. at 60–62.) After playing the call, Mr. Childers was asked why during that call he said that he didn't know why his brother (Mr. Whitehead) had that "shit" with him because that was their "safe spot." (*Id*. at 62.)

Mr. Childers continued to evade the questions and he asked counsel to play the recording again. (*Id*. at 62–63.) After the call was replayed, Mr. Childers confirmed that the "he" mentioned in the call was Mr.

Whitehead. (*Id*. at 64.) Ultimately, despite twice hearing the phone call in open court, Mr. Childers denied knowing that Mr. Whitehead possessed the gun found in the southwest bedroom. (*Id*. at 65.) Then, on re-direct, Mr. Childers acknowledged that he and Mr. Whitehead spoke the night before his testimony and that Mr. Whitehead told him that he might be impeached. (*Id*. at 71–72). However, Mr. Childers became evasive again when questioned about what he and his brother talked about during the call that was ultimately played to impeach him. (*Id*. at 72.)

IV. The Patrol Car Recording.

At trial, the government played a police patrol car video recording (Government Exhibit 17) that captured a conversation between Mr. Childers and Mr. Whitehead while the two sat in the back of a police car on the date of their arrest. *Id*. at 78–79.)[2] During the call, the jury heard:

> TYLIN CHILDERS: Was you up?
>
> OTIS WHITEHEAD: Hmm-umm.
>
> TYLIN CHILDERS: Was you asleep?

[2] The record has been supplemented to add Government Exhibit 17 by Appellant's Unopposed Motion to Supplement the Record filed on November 11, 2024.

OTIS WHITEHEAD: Yeah, they bust the door open.

TYLIN CHILDERS: Where was it at?

OTIS WHITEHEAD: Wide open.

TYLIN CHILDERS: Where was it at?

OTIS WHITEHEAD: What?

TYLIN CHILDERS: Pistol.

OTIS WHITEHEAD: Ah, bro that motherfucker was in the jacket in my room.

TYLIN CHILDERS: They probably got it. I don't know.

OTIS WHITEHEAD: Hell, yeah, they had to get it.

(Ex. 17 at 1:05–1:30.)

Based on the context of this conversation, the two men did not yet know what the police had found inside that house. However, unprompted, Mr. Childers asks about "the pistol" and Mr. Whitehead said it was in the jacket in his room. The firearm was found exactly where Mr. Whitehead said it would be.

V. DNA evidence and fingerprint evidence.

The firearm in question was analyzed by OCPD for both fingerprint and DNA evidence. According to Ofc. Harmon's testimony, "the fingerprint evidence was of no evidentiary value and the DNA evidence

was inconclusive." (ROA, Vol. 3, at 35–36.) In his experience, that was not uncommon. (*Id*. at 36.)

OCPD forensic examiner Dan Russell also testified about the testing procedures he used to test the DNA profiles taken from the firearm in question and how the results were inconclusive. (*Id*. at 88–94.) Mr. Russell was unable to do anything with the samples taken from the gun except to testify that there was more than one person's profile present. (*Id*. at 95.) Mr. Russell also stated that his testing did not exclude Mr. Whitehead's DNA from being present on the recovered firearm because he could not provide *any* information about whose DNA was on the firearm. (*Id*. at 97.)

VI. The Trial Testimony of Lesley Gill.

Lesley Gill was called to testify at trial by Mr. Whitehead's counsel. She testified that she purchased the firearm in question during February 2023. (ROA, Vol. 3, at 99). Around that same time Ms. Gill was moving residences, and she asked her daughter Janashia Shockley to hold on to some of her personal belongings. (*Id*. at 100–101.) According to Ms. Gill, her daughter took possession of those belongings, including her firearm, which were stored in plastic totes. (*Id*. at 101.)

Ms. Gill also testified about how she did not know what happened to her gun after her daughter took it from her house, including whether her daughter gave it to someone else. (*Id*. at 106.) She also did not know how her gun got into the house where it was recovered, and she did not authorize anyone at that house to have her gun. (*Id*. at 105–106.) Finally, she testified that she had no information demonstrating that Mr. Whitehead did not possess her firearm. (*Id*.)

VII. The Trial Testimony of Otis Whitehead.

Mr. Whitehead also took the stand to testify in his own defense at trial. He claimed that he did not live at 2237 Northwest 32nd and instead that he lived with his wife and kids at 3008 Hillside. (ROA, Vol. 3, at 110.) Mr. Whitehead said that he was only visiting Mr. Childers' house on March 14, 2023, to play video games with his family members and that he got there around 1:00 or 2:00 a.m. (*Id*. at 111.) Regarding the firearm, Mr. Whitehead testified that he knew the firearm was in the house because Mr. Childers' then-girlfriend, Ms. Shockley, brought the gun to the house and she told Mr. Whitehead she had brought it. (*Id*. at 113–114.) Mr. Whitehead also admitted to several felony convictions. (*Id*. at 114.)

During cross-examination, Mr. Whitehead admitted that he and Mr. Childers are close and that they even go by the nicknames "South" and "Lil South." (*Id*. at 117.) Further, he admitted that he is frequently at Mr. Childers' residence. (*Id*.) He admitted that he had mail in that room dating back to December 2022. (*Id*. at 121.) He also testified that the black jacket was his, that it was hanging in the same room where his stuff was, and that there was a gun in his jacket. (*Id*. at 122.)

Government counsel then played Government Exhibit 17, the video recording of Mr. Childers and Mr. Whitehead sitting in the back of the patrol car. (*Id*.) Mr. Whitehead admitted that Mr. Childers asked him about the pistol, and he agreed that he told his brother that it was in the jacket in "my" room. (*Id*.) During his testimony, Mr. Whitehead acknowledged telling his brother it was "my room," but he tried to explain that it was not really his room. (*Id*. at 122–123.) Later during cross-examination, Mr. Whitehead again confirmed that the jacket where the gun was found belonged to him. (*Id*. at 126.) He also confirmed that the gun he and his brother were discussing in the back of the patrol car was the same gun found in his jacket. (*Id*.)

Also, during cross-examination, the government played several video recordings from calls that Mr. Whitehead made from jail while awaiting trial.[3] (*Id.* at 128–137.) These related to Mr. Whitehead's attempts to influence people to take responsibility for the gun instead of him. (*Id.*)

For example, the government played a video call from August 21, 2023, between Mr. Whitehead and female friend, Hatashia Bowman, where the two discuss Janashia Shockley and whether "she was okay with this." (*Id.* at 132.) During this line of questioning, Mr. Whitehead was confronted about why during this call he said "It ain't even a lie," then laughed, and then said, "I'm just playing." (*Id.* at 132–133.) Then, Mr. Whitehead was asked to explain why he wanted to know whether Ms. Bowman "got this." (*Id.* at 133.)

The government played another video call from October 15, 2023, which included Mr. Whitehead, Ms. Bowman, and Ms. Shockley. Following the video, government counsel questioned Mr. Whitehead about his desire to find out if Ms. Shockley was going to help him out.

[3] Because the calls themselves were played primarily for impeachment purposes, they were not introduced into evidence.

(*Id*. at 134.) Then, Mr. Whitehead was asked to explain why he quickly cut Ms. Shockley off and would not let her explain her decision not to help him while they spoke on a recorded line. (*Id*. at 135.)

VIII. Mr. Whitehead's Sentencing.

On December 6, 2023, the jury returned a guilty verdict against Mr. Whitehead for the sole count of being a felon in possession of a firearm. (ROA, Vol 1., at 124.) The United States Probation Office for the Western District of Oklahoma prepared an initial Presentence Report (PSR), and the final PSR was filed on February 8, 2024. (ROA, Vol. 2, at 7–29.) Based on a total offense level of 22 and a criminal history category of VI, the advisory guideline imprisonment range was calculated at 84 to 105 months. (*Id*. at 23.) That offense level included a two-point enhancement pursuant to USSG § 3C1.1 for obstruction of justice based on Mr. Whitehead's false testimony at trial. (*Id*. at 13–14.) Mr. Whitehead objected to the enhancement for obstruction. (ROA, Vol 1., at 125–126.)

On March 18, 2024, the district court held Mr. Whitehead's sentencing hearing. (ROA, Vol. 3, at 187–217.) The district court addressed the parties' objections, including the objection to the obstruction enhancement. It correctly noted that it was the government's

burden to establish by a preponderance of the evidence that the defendant's conduct warranted the enhancement. (*Id.*)

To satisfy this burden, the government provided the court with copies of the trial transcript and reiterated the legal standard set forth in *United States v. Dunnigan*, 507 U.S. 87 (1993). The government directed the court to several specific lines of questioning where Mr. Whitehead's trial testimony was impeached. (*Id.* at 191–195.) Mr. Whitehead's counsel maintained his opposition to the enhancement and argued that Mr. Whitehead was not attempting to obstruct justice and instead was trying to "complete the story so that we had the entire picture at trial." (*Id.* at 196.)

The district court stated that Mr. Whitehead was testifying under oath and that Mr. Whitehead was "less than forthcoming with respect to his conversations and exchanges with respect to Ms. Shockley and his effort to try to get her to take responsibility for that gun." (*Id.* at 197.) The district court determined that Mr. Whitehead's testimony was material as it went to his responsibility for possession of the firearm and that Mr. Whitehead's testimony was not the result of "any confusion, mistake, or faulty memory." (*Id.*) The court sustained the government's

objection and applied the enhancement pursuant to USSG § 3C1.1. (*Id.* at 197–198.) The court ultimately sentenced Mr. Whitehead to a term of imprisonment of 87 months. (*Id.* at 213.) The court specifically noted that this would have been the same sentence "with or without the disputed enhancement we have argued here today." (*Id.*)

Summary of the Argument

Mr. Whitehead's claim that the government did not submit sufficient evidence to support a conviction for being a felon in possession of a firearm should fail. In viewing the testimony and evidence presented at trial in a light most favorable to the prosecution, a rational juror could have easily found that the government satisfied the elements necessary for a conviction beyond a reasonable doubt. At trial, the government presented a nexus between Mr. Whitehead and the firearm sufficient to support the logical inference that Mr. Whitehead had access to the firearm and intent to exercise power or control over it. Mr. Whitehead's conviction should be affirmed.

Second, the district court properly applied the two-point enhancement pursuant to USSG § 3C1.1 because Mr. Whitehead obstructed justice when he committed perjury during his testimony. As

the district court correctly noted at the sentencing hearing, Mr. Whitehead willfully gave false testimony under oath, concerning a material matter, and his testimony was not the result of confusion, mistake, or faulty memory. Mr. Whitehead's request for remand is unnecessary and not supported by the record.

Finally, Mr. Whitehead's claim (for preservation) that 18 U.S.C. § 922(g)(1) is unconstitutional should fail because the binding precedent in this Circuit forecloses such a claim.

Argument

I. The evidence presented at trial was sufficient to support Mr. Whitehead's conviction for being a felon in possession of a firearm.

Mr. Whitehead asserts that the government did not submit sufficient evidence to show that Mr. Whitehead constructively possessed a firearm because it was not demonstrated that that he had intent to exercise control over the firearm. Mr. Whitehead made two Rule 29 Motions for Judgement of Acquittal on these grounds and the district court overruled those motions. (ROA, Vol. 3, at 83–85, 143.)

A. Standard of Review.

A claim of insufficient evidence to support a conviction is reviewed de novo to determine whether, "'viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt.'" *United States v. Stepp*, 89 F.4th 826, 832 (10th Cir. 2023) (quoting *United States v. Gordon*, 710 F.3d 1124, 1141 (10th Cir. 2013)). A defendant who raises an insufficiency of the evidence challenge is "faced with a high hurdle" because the reviewing court "must review the record de novo and ask only whether taking the evidence – both direct and circumstantial, together with the reasonable inferences to be drawn therefrom – in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Sanchez*, 2024 WL 3336319 at *5 (10th Cir. 2024) (citing *United States v. Voss*, 82 F.3d 1521, 1524–25 (10th Cir. 1996)) (internal quotations and citations omitted).

This trial evidence, along with the associated reasonable inferences, must be substantial but the evidence presented does not have to exclude every possible hypothesis and it "need not negate all possibilities except guilt." *United States v. MacKay*, 715 F.3d 807, 812

(10th Cir. 2013). The reviewing court must consider the burden of proof, and the test is always whether a rational jury could have determined proof of the elements and guilt beyond a reasonable doubt. *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013).

Even if the reviewing court believes that the evidence in the record could raise conflicting inferences, it is required to defer to the jury's resolution. *Cavazos v. Smith*, 565 U.S. 1, 7 (2011). "A reviewing court "'faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). It is the jury's responsibility, not a reviewing court's responsibility, to determine what conclusions should be made from evidence presented at trial. *Jackson*, 443 U.S. at 319. A review based on the sufficiency of the evidence is limited and deferential; the Court "'may reverse only if *no* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Stepp*, 89 F.4th at 832 (quoting *United States v. Griffith*, 928 F.3d 855, 868–69 (10th Cir. 2019) (emphasis added)).

B. Discussion.

There was no dispute at trial that both parties presented this as a constructive possession case since the firearm was found in a room used by Mr. Whitehead rather than on his person. In this Circuit, constructive possession exists when a person who lacks physical custody of an object but still has the power and intent to exercise control over the object. *United States v. Johnson*, 46 F.4th 1183, 1186-87 (10th Cir. 2022) (citing *United States v. Benford*, 875 F.3d 1007, 1020 (10th Cir. 2017)).

The firearm was found in Mr. Whitehead's bedroom, a room littered with objects, including mail and clothing belonging to Mr. Whitehead. (ROA, Vol. 3 at 30–32.) Additionally, that southwest bedroom could be accessed by other individuals in the house, and there was a teenage female in that southwest bedroom on the morning the search warrant was executed. (ROA, Vol. 3. at 49–50.) Since joint occupancy alone cannot sustain an inference of constructive possession, in a case like this, the government must also show a nexus between the defendant and the firearm. *Benford*, 875 F.3d at 1015; *see also United States v. Hishaw*, 235 F.3d 565, 571 (10th Cir. 2000).

The "government must demonstrate the defendant knew of, had access to, and intended to exercise dominion or control over the contraband." *United States v. Johnson*, 46 F.4th at 1187. This "may be proved by circumstantial as well as direct evidence." *Id.* (quotation marks omitted). Multiple people can constructively possess an object and exclusive possession is not required. *See United States v. McKissick*, 204 F.3d 1282, 1291 (10th Cir. 2000) (discussing joint occupancy and nonexclusive possession).

Here, ample evidence supporting the jury's conclusion that Mr. Whitehead possessed the gun in question. First, Mr. Whitehead was found inside this house on the same day, within moments, of the discovery of the firearm in the southwest bedroom alongside his personal belongings. (ROA, Vol. 3, at 26.) Second, when officers first encountered Mr. Whitehead, he ignored commands to come out of the living room and instead disappeared to the same area where the gun was ultimately found before coming back and surrendering. (*Id.*) Third, the evidence demonstrated that the southwest bedroom appeared to be primarily occupied by a male and, despite a teenage female sleeping in that room, the officer did not recall seeing any female clothes in that room. (*Id.* at

31–32, 50.) The pictures admitted into evidence also indicate that a male stayed in this room, and they did not show any female clothes. (*Id*. at 30–32.)

While Mr. Whitehead disputed that this room was his, he admitted that he and his brother were close and that he was frequently at Mr. Childers' house. (*Id*. at 117.) He also admitted that he told Mr. Childers the gun was in the jacket in "my" room while the two were in the back of the patrol car. (*Id*. at 122.) That gun was found exactly where he said it would be. He admitted on cross-examination that the jacket where the gun was found belonged to him. (*Id*. at 126.) That jacket where the gun was found was hanging on the door of a closet which also contained a jacket with the name "Otis" on it. (*Id*. at 32.) Mr. Whitehead admitted that he had mail sent to this location dating back to nearly four months prior to the discovery of the gun. (*Id*. at 122.) Mr. Whitehead admitted that he knew the gun was in that room, he knew that it was new, and he knew it was unloaded. (*Id*. at 122, 125–126.)

A reasonable juror could easily conclude that Mr. Whitehead put that gun in his jacket, in the room he had access to and used, and near his other belongings. The gun was not well hidden. It was hanging out

of the jacket pocket, and he admitted to his brother and during the trial that he knew the gun was in his jacket. (*Id*. at 32, 122, 127.)

A reasonable juror could have also concluded that Mr. Whitehead, who was admittedly aware of his felon status, had a motive to hide the firearm or remove himself from its presence when police arrived. This bears on the constructive possession inquiry. *See Sanchez*, 2024 WL 3336319 at *10 (citing *United States v. Foster*, 891 F.3d 93, 111 (3d Cir. 2018) ("Factors we have considered when determining whether the government has proven dominion or control include 'evidence that the defendant attempted to hide or destroy the contraband, ... that the defendant lied to police about his identity,' and the defendant's proximity to the prohibited item." (omission in original) (emphasis added) (quoting *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996))).

Moreover, the evidence of constructive possession in this case is consistent with other cases in which this Court has upheld the sufficiency of the evidence. For example, in *United States v. Campbell*, 763 F. App'x 745, 749 (10th Cir. 2019), this Court determined that the government met its burden of demonstrating constructive possession by presenting evidence showing that the firearm in question was found in a toolbox the

defendant was using to work on a go-cart. In *United States v. Martinez*, 749 F. App'x 698, 704–05 (10th Cir. 2018), this Court concluded that the government satisfied its burden of demonstrating constructive possession when the firearm was found in a bedroom where the defendant kept her personal effects and ammunition was found in plain view on top of her bed. In *Stepp*, the prohibited ammunition was found in areas that the defendant actively used, alongside his personal belongings, and this Court held that this supported a rational inference that he had access to, knowledge of, and intent to control the ammunition. *Stepp*, 89 F.4th at 835.

After reviewing the evidence and reasonable inferences therefrom in a light most favorable to the government, a reasonable jury could have found that Mr. Whitehead constructively possessed the firearm beyond a reasonable doubt. This Court should uphold Mr. Whitehead's conviction.

II. The district court did not err when it applied the two-point enhancement pursuant to USSG § 3C1.1.

Prior to the issuance of the final PSR, the government objected to the lack of an enhancement pursuant to USSG § 3C1.1 for Mr. Whitehead's obstruction of justice. (ROA, Vol. 2, at 27.) The PSR writer concurred with the government and applied the enhancement which

raised Mr. Whitehead's total offense level to 22 with a guideline range of imprisonment of 84 to 105 months. (*Id*.) Mr. Whitehead objected to the enhancement in his sentencing memorandum. (ROA, Vol. 1, at 126.) At the sentencing hearing, the district court sustained the government's objection and applied the two-point enhancement. (ROA, Vol. 3, at 197.)

A. Standard of Review.

To apply the USSG § 3C1.1 enhancement for perjury, the district court must find that the defendant (1) testified falsely under oath, (2) about a material matter, and (3) the false testimony was willful and not the result of confusion, mistake, or faulty memory. *United States v. Fernandez-Barron*, 950 F.3d 655, 657 (10th Cir. 2019) (citing *United States v. Rodebaugh*, 798 F.3d 1281, 1300 (10th Cir. 2015)).

In reviewing "'the district court's interpretation and application of the Sentencing Guidelines, [this Court] reviews legal questions de novo and factual findings for clear error.'" *Fernandez-Barron*, 950 F.3d at 658 (quoting *United States v. Mollner*, 643 F.3d 713, 714 (10th Cir. 2011)).

A finding of fact is "clearly erroneous" when there is no factual support in the record or, after reviewing the record, the appellate court is left with a firm and definite conviction that a mistake was made.

United States v. Pulliam, 748 F.3d 967, 970 (10th Cir. 2014). The appellate court "must uphold any district court finding that is permissible in light of the evidence." *Id.* (quotation marks omitted).

B. Discussion.

It well settled that a sentencing court must make a specific finding, aside from the jury's finding of guilt, that the defendant has perjured himself. *United States v. Massey*, 48 F.3d 1560, 1573 (10th Cir. 1994) (citing *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)). Although *Dunnigan* did not require district courts to specifically identify the perjurious statement, in this Circuit, district courts are required to identify the portion of the defendant's testimony it believed to be false. *United States v. Hawthorne*, 316 F.3d 1140, 1145–46 (10th Cir. 2003). It is also preferrable that sentencing courts address the elements of the alleged perjury in a clear and separate finding. *United States v. Gomez-Castro*, 839 F. App'x 238, 253 (10th Cir. 2020).

Mr. Whitehead contends that the obstruction enhancement is not properly applied when a defendant testifies and is later found guilty. Aplt. Br. at 35. The government has never asserted this position and the enhancement was not applied simply because Mr. Whitehead testified

during his trial and was later found guilty. It was applied because Mr. Whitehead made false statements under oath during specific portions of his testimony.

Specifically, Mr. Whitehead testified falsely about his attempts to get Ms. Shockley to take responsibility for the gun. At trial, Mr. Whitehead was asked whether he ever tried to get Janashia Shockley to take responsibility for that gun and he responded "No." (ROA, Vol. 3 at 128.) He was asked again, and he responded "No." (*Id*.) He was asked whether he ever called Ms. Bowman to help him get Ms. Shockley to take responsibility for the gun. (*Id*.) Mr. Whitehead said, "No", "I wanted Janashia to meet up with my lawyer to say why that gun was there." (*Id*.)

Then Mr. Whitehead was impeached with a call to Ms. Bowman. (*Id*. at 131–132.) After hearing the call played in open court, Mr. Whitehead agreed with counsel that he "wanted to know if she was okay with this." (*Id*. at 135.) Mr. Whitehead continued to try and assert that he meant for Ms. Shockley to go and meet with his lawyer. Mr. Whitehead was asked repeatedly whether he told Ms. Bowman that what he was asking for was not a lie, then laughed, and ultimately said "I'm just playing." Mr. Whitehead never denied saying those things to Ms.

Bowman and instead tried to explain that he really meant for Ms. Shockley to meet with his lawyer. It might be true that Mr. Whitehead wanted Ms. Shockley to meet with his lawyer, but one thing was clear: whatever he needed her to say, to whoever, was not true.

When confronted at trial about his intentions, Mr. Whitehead continued to lie. The falsity of his statements became even more evident when he was confronted with an October 15, 2023 video call that he made to both Ms. Bowman and Ms. Shockley which was played in open court. (*Id.* at 133–134.)

Mr. Whitehead agreed with counsel's question that he "demanded" to talk to Ms. Shockley in that video call. (*Id.* at 133.) Mr. Whitehead denied that he "wanted to know whether or not it was true that [Ms. Shockley] was not going to claim this gun." (*Id.* at 135.) He denied that he cut Ms. Bowman off as she tried to explain their reasoning. (*Id.*) The district court and the jury had just watched the video and saw what happened. Then, Mr. Whitehead was asked if he did that because he knew that they were on a recorded call, and he responded that he did not. (*Id.*) However, Mr. Whitehead pivoted and said that "I was told not to talk about none of it because it could get me in trouble" even though he

was the one who initially demanded to talk to Ms. Shockley about it. (*Id.*)

The district court saw those videos and had the ability to assess Mr. Whitehead's demeanor and responses to the questions asked. Generally, district courts are given discretion in their fact-finding capacity because they have the advantage of personally observing the trial. *United States v. Chavarin*, 810 F. App'x 631, 635 (10th Cir. 2020) (citing *Gall v. United States*, 552 U.S. 38, 51–52 (2007)). At the sentencing hearing, the district court referenced those videos and said, "I certainly recall those." (*Id.* at 193.)

Then the district judge asked government counsel to cite to specific instances during Mr. Whitehead's testimony that corroborated the government's position on the obstruction enhancement. (*Id.*) The government complied and provided the district court with a transcript from Mr. Whitehead's testimony and described Mr. Whitehead's continued lies and impeachment with the videos. (*Id.* at 192–195.)

At the sentencing hearing, the district court correctly identified the factual predicates of perjury and the portions of Mr. Whitehead's testimony it believed to be false. It noted that Mr. Whitehead was under oath and then cited to the transcript in saying "it appears from the

transcript here defendant was less than forthcoming with respect to his conversations and exchanges with respect to Ms. Shockley and his effort to try to get her to take responsibility for that gun." (*Id*. at 197.)

The district court believed this was material because it went to Mr. Whitehead's "possession or responsibility" for the firearm. (*Id*.) That is a crucial part of the constructive possession analysis. Finally, the district court did not believe that Mr. Whitehead's perjurious testimony was the result of any confusion, mistake, or faulty memory. (*Id*.) All of this Circuit's standard requirements to apply this enhancement were met and clearly articulated by the district court. This Court has not been left to speculate what particular portions of Mr. Whitehead's testimony that the district court determined to be false, and the application of the enhancement was proper.

Mr. Whitehead's brief acknowledges that the district court stated that he would have sentenced Mr. Whitehead to the same sentence without the application of the enhancement for obstruction. Aplt. Br. at 37–38. However, Mr. Whitehead requests that if this Court finds that the application was improper, the Court should remand the case for resentencing. Since the application of that enhancement was proper,

that request is moot. However, if this Court finds that application of the enhancement was improper, which it should not, then resentencing would still be unnecessary.

Even ff error is found however, resentencing is only required where the error is not harmless. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014). Here, the reviewing Court has not been left to speculate on whether the district court would have reached the same decision absent the error. The district court was very thorough in its explanation about why it imposed a sentence of 87 months, including the fact it would have imposed the same sentence even without application of the obstruction enhancement, making remand unnecessary.

III. 18 U.S.C. § 922(g)(1) has been held to be constitutional and Mr. Whitehead is not entitled to relief.

Mr. Whitehead requests that his conviction be vacated because he believes that 18 U.S.C. § 922(g)(1) is unconstitutional after *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Aplt. Br. at 39. Mr. Whitehead correctly acknowledges that this claim is still technically precluded by *Vincent v. Garland*, 80 F.4th 1197 (10th Cir.

2023).[4] Since the binding precedent in this Circuit remains the same, Mr. Whitehead's request should be denied, and his conviction upheld.

A. Standard of Review.

The standard of review is for plain error. *United States v. Martinez-Torres*, 795 F.3d 1233, 1236 (10th Cir. 2015).

B. Discussion.

In *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), this Court rejected the defendant's claim that 18 U.S.C. § 922(g)(1) was unconstitutional. In doing so, this Court relied upon the Supreme Court opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and noted that the Supreme Court specifically said "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. *McCane*, 573 F.3d at 1047 (quoting *Heller*, 554 U.S. at 626).

Then came the case of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), which instituted a two-part test for determining the constitutionality of firearm prohibition statutes. The *Bruen* analysis

[4] The Supreme Court granted the petition for writ of certiorari in *Vincent*, vacated the judgment, and remanded to the Circuit for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024).

asks 1) does the regulated conduct fall within the scope of the Second Amendment, and 2) is that regulation consistent with the historical tradition of firearm regulations in this country. *Bruen*, 597 U.S. at 17.

Two years later, the Supreme Court decided *United States v. Rahimi*, 602 U.S. 680 (2024), which gave the Supreme Court a chance to clarify the boundaries of the historical analysis when it upheld the constitutionality of 18 U.S.C. § 922(g)(8) and vacated the Fifth Circuit ruling declaring it unconstitutional. In short, the Supreme Court stated that someone who is a credible threat to the safety of another may be temporarily disarmed. *Rahimi*, 602 U.S. at 702. Most notably, the *Rahimi* Court cited *Heller's* guidance that laws prohibiting the possession of firearms by "felons and the mentally ill" are "presumptively lawful." *Id.* at 682.

Rahimi had zero impact on the constitutionality of 18 U.S.C. § 922(g)(1). Not long after the decision in *Rahimi*, the Tenth Circuit rejected a claim that *Rahimi* abrogated *McCane*. *See United States v. Curry*, No. 23-1047, 2024 WL 3219693, at *4 n.7 (10th Cir. June 28, 2024) (observing that *Bruen* neither overruled nor expressly abrogated *McCane* and finding that *Rahimi* also "does not indisputably and pellucidly

abrogate" *McCane*). This means *McCane* is still the binding precedent in this Circuit and that the prohibitions outlined in 18 U.S.C. § 922(g)(1) are still constitutional. Mr. Whitehead's request to vacate his conviction on this ground should be denied.

Conclusion

For these reasons, the government respectfully request that this Court should affirm Mr. Whitehead's conviction and sentence.

Respectfully submitted,

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

As required by Fed. R. App. P. 32(g), I certify that this brief is proportionally spaced and contains 6,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I relied on my word processor to obtain the count and it is: Microsoft Word 365.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Jason Harley
Assistant U.S. Attorney

IN THE

Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX D

Reply Brief for Otis Ray Whitehead, Jr.
(January 29, 2025)

No. 24-6062

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee**,**

v.

Otis Ray Whitehead, Jr.,
Defendant-Appellant**.**

On Appeal from the United States District Court
for the Western District of Oklahoma
District Court No. CR-23-280-J
The Honorable Bernard M. Jones, District Judge

Appellant's Reply Brief

Respectfully submitted,
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January 29, 2025

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CASES

Argument in Reply

I. Contrary to the government's repeated claims, Mr. Whitehead never testified the gun was in "his" jacket.

The jury trial testimony and evidence established that the gun in question was found sticking out of the pocket of a black Carhartt jacket hanging over the door of a closet in a room in Tylin Childers' residence.[1] *See* ROA, Vol. 3, at 35–36 (32–33);[2] Gov. Ex. 15.[3] Inside the closet hung a different jacket, colored navy blue, with no visible branding, and the name "Otis" stitched on the front (hereinafter "Otis jacket"). *See* Gov. Ex. 13; ROA, Vol. 3, at 35 (32), 48 (45), 54 (51), 129 (126). It is this jacket,

[1] This room was sometimes used by Mr. Whitehead as well as others.

[2] The government uses the jury trial transcript's original/native pagination rather than citing to the pagination of the record on appeal (ROA). In this reply brief, Mr. Whitehead will first use the ROA's page numbering, and then in parentheses include the native pagination, like so: ROA, Vol. 3, at X (Y). X = the ROA page number; Y = native pagination.

[3] The government exhibits referenced in this brief will be included in a second supplement to the record. *See Motion to Supplement the Record* filed by Mr. Whitehead on January 27, 2025; *Order* granting the motion filed the same day.

and this jacket only, that Mr. Whitehead said was his, not the black Carhartt jacket. The government seems to think otherwise, but the trial testimony does not establish this—and its misstatements materially affect the analysis as to whether the jury was presented sufficient evidence to prove beyond a reasonable doubt that Mr. Whitehead intended to control the firearm in the pocket of the black Carhartt jacket.

In its Statement of the Case, the government claims Mr. Whitehead testified "that the black jacket was his, that it was hanging in the same room where his stuff was, and that there was a gun in his jacket." Pl.'s Br. at 10 (citing ROA, Vol. 3, at 125 (122)). But that is not what he said. During the government's cross-examination of Mr. Whitehead, the government displayed Government Exhibit 15, a photo of the black Carhartt jacket, *id*. at 124 (121), then the Assistant United States Attorney (AUSA) asked Mr. Whitehead, "So—and that black jacket, that was hanging in that room where your stuff was, right?" *Id*. at 125 (122). Mr. Whitehead replied, "Uh-huh." *Id*. The AUSA asked, "Was that a 'yes'?" *Id*. Mr.

Whitehead then asks for clarification, "Where my jacket was?" *Id*. The AUSA says, "Yes." *Id*. And Mr. Whitehead then responds, "Yes." *Id*.

The AUSA did not ask Mr. Whitehead whether *the black jacket* was his, and Mr. Whitehead did not say the black jacket was his.[4] Mr. Whitehead answered "yes" in response to the question asking whether the black jacket was hanging in the room where his stuff was. Mr. Whitehead's question to the AUSA, "Where my jacket was?," was not claiming ownership of the black Carhartt jacket, it was clarifying what room the AUSA was talking about. With this clarification, Mr. Whitehead could answer the AUSA's question: was that black Carhartt jacket in that same room? Yes.

The government also incorrectly states in its brief that Mr. Whitehead "confirmed that the gun he and his brother were discussing in the

[4] Mr. Whitehead claimed all along the black jacket was not his—*see, e.g.*, ROA, Vol. 3, at 24 (21) (defense opening statement in which his attorney explained that officers found Otis's navy blue jacket with his name stitched on the front and then another black jacket nearby); *id*. at 172–73 (defense closing argument, discussing Mr. Whitehead's jacket as the Otis jacket and never claiming ownership of the black jacket).

back of the patrol car was the same gun found in his jacket," Pl.'s Br. at 10 (citing ROA, Vol. 3, at 128 (126)), and that "he admitted on cross-examination that the jacket where the gun was found belonged to him," Pl.'s Br. at 20 (making same citation). But a review of the transcript shows this is not accurate. The AUSA questioned Mr. Whitehead about the conversation with his brother in the back of the patrol car but never asked Mr. Whitehead whether the black jacket belonged to him:

> AUSA Harley: So let's pull up Government Exhibit 13.
>
> Q (By Mr. Harley): This room that you called "my room," the room in the house that you said was your residence to police, that jacket was found in that same room, wasn't it?
>
> A (By Mr Whitehead): Yes.
>
> Q: That's your jacket, right?
>
> A: Yes.

ROA, Vol. 3, 128 (126). Government Exhibit 13,[5] the photo that Mr. Whitehead was viewing at the time of this testimony, is a photo of the Otis jacket, not a photo of the black jacket where the gun was found.

Nowhere in the entire transcript does Mr. Whitehead state or even suggest that the black jacket was his. Unfortunately, the government misapprehended the evidence in this case during the jury trial, not just during this appeal. In closing argument, without any defense objection (inexplicably), the government argued four times that Mr. Whitehead admitted the black jacket was his:

Once: "If you'll remember on cross-examination, he then admitted that that black jacket, in addition to everything else in that room, was also his."[6] ROA, Vol. 3, at 164 (161). Twice: Arguing to the jury Mr. Whitehead's testimony that Ms. Shockley brought the gun to the house

[5] Government Exhibit 13 is included in the Second Supplemental Record on Appeal.

[6] He neither admitted the black jacket was his nor admitted everything in the room was his. *See* ROA, Vol. 3, at 120–140 (117–137) (Otis Whitehead cross-examination).

was preposterous: "So she sneaks into this room or goes into this room and hides a gun in a coat that he admits is his?" *Id.* at 166 (163). Thrice: "He has the intent to exercise dominion and control over stuff in his room. And you know it's his room because he admits that the coat was his where the gun was found….." *Id.* at 167 (164). Fourth Time: "If Mr. Whitehead is a felon and that is his jacket and his stuff in that room, just like he said, then why did he let that firearm stay in his jacket if he's not supposed to be around them, unless he intended to exercise control over it." *Id.* at 176 (173).

But this was not a case in which Mr. Whitehead was attempting to explain how the gun got into *his* jacket pocket—it was about whether the government could prove beyond a reasonable doubt that he constructively possessed—specifically that he intended to control—the gun in the black Carhartt jacket, ownership unknown. He only claimed ownership of the Otis jacket. Mr. Whitehead testified on direct examination by his attorney that he knew there was a gun in the house, and that he knew it was

there because he saw it. *Id*. at 116 (113). He did not say, e.g., "I saw it in my jacket."

The government's misconception of the evidence in this case and presentation during closing argument may have affected the jury's own recollection of the testimony. It is much harder to conclude a person has no intent to control a firearm sitting in the pocket of a jacket he admits is his. But the government's arguments are not evidence. Mr. Whitehead admitted he knew the gun was in the house—he saw it was there. *Id*. at 116 (113). As outlined in Mr. Whitehead's Statement of the Case in his opening brief, the jury heard a recording in which Mr. Whitehead told his brother the gun was in the jacket in his room; the jury heard testimony establishing multiple people used and stayed in the room where the gun was found. It heard testimony and saw recent mail addressed to Mr. Whitehead at a different address. It heard testimony that another individual was found sleeping in that room on the morning in question. It heard testimony from Officer Harmon that the black jacket was bigger

than the Otis jacket. *Id*. at 48 (45). But it heard no testimony that the jacket where the gun was found belonged to Mr. Whitehead.

II. This case is distinguishable from the constructive possession cases cited by the government.

The government describes *United States v. Campbell*, 763 F. App'x 745, 749 (10th Cir. 2019) as a case in which the government proved constructive possession by "presenting evidence showing that the firearm in question was found in a toolbox the defendant was using to work on a go-cart." Pl.'s Br. at 21. There, Mr. Campbell was the only person present at the time officers discovered the revolver; the revolver was 10–15 feet away from him in a tool bag with nearby tools scattered around a go-kart, and there was ample physical evidence demonstrating Mr. Campbell was just working on that go-kart. *Campbell*, 763 F. App'x at 749. *Campbell* was a case with "overwhelming evidence tying Mr. Campbell to the revolver," case in which a jury assuredly "would have concluded Mr. Campbell had intended to exercise control over the bag and its contents, including the revolver." *Id*. The case against Mr. Whitehead cannot be characterized as such.

The government cites to *United States v. Martinez*, 749 F. App'x 698 (10th Cir. 2018) as comparable to Mr. Whitehead's situation, but in that case testimony established the defendant was a high-level drug dealer who sold drugs to an informant in the bedroom where she kept her personal effects and where a shotgun not used for sport was found. *Id.* at 704–705. That same bedroom contained 133 grams of methamphetamine, 150 grams of heroin, $1,300 in cash, and distribution packaging and the jury heard testimony that drug traffickers possess firearms to protect themselves, their products, and their proceeds. *Id.* at 705. This is quite a different situation from Mr. Whitehead's.

Finally, the government points to *United States v. Stepp*, 89 F.4th 826 (10th Cir. 2023) in which this Court found there was sufficient evidence to support the defendant's felon-in-possession conviction. There, ammunition was found in a jointly occupied home office space containing physical evidence demonstrating the defendant actively used the home and the office space. It was apparent from a driver license, a hospital bracelet, and a bag from a medical center that the defendant, a gunshot

victim, had just discharged from the hospital and entered the home. *Id.* at 829, 834. The office included a monitor, displaying live video from home security cameras, and a custom mouse pad featuring a picture of the defendant and his girlfriend. *Id.* at 834. The ammunition was organized in cabinets in the home office, as well as scattered on the living room floor and intermixed with Mr. Stepp's personal belongings. *Id.* at 833. This is a far cry from Mr. Whitehead's situation.

While this Court found in *Stepp* found that "the ammunition's presence in areas Mr. Stepp actively used, alongside his personal belongings" supported a "rational inference that he had access to, knowledge of, and an intent to control the ammunition," *id.* at 835, this was a holding based on those very particular facts. Mr. Whitehead admitted he saw the gun in question, but seeing it does not infer intent to control, nor does its presence in the jointly occupied room.

Mr. Whitehead's situation is more akin to *United States v. Taylor*, 113 F.3d 1136 (10th Cir. 1997), in which a handgun was found in a bedroom closet in a jointly occupied apartment. In the same bedroom agents

found receipts and tickets belonging to the defendant in an entertainment center. *Id.* at 1139. But another person was in the bedroom at the time of the search, not the defendant. *Id.* This Court ultimately concluded there was insufficient evidence to prove that the Defendant constructively possessed the handgun in the closet from the mere fact the defendant was one of the bedroom's occupants. *Id.* at 1146.

The evidence presented to the jury established that Mr. Whitehead was a mere occupant of the bedroom at times, despite him at times referring to it as "my room." The evidence established that he saw the gun, and that his jacket hung in the closet. These facts are insufficient to establish that Defendant intended to exercise dominion or control over the handgun.

III. The obstruction enhancement was improperly applied.

The government has been determined to view Mr. Whitehead as a liar and to view him through that lens. An obstruction enhancement, however, is "not appropriate unless the record clearly indicates that the defendant committed or suborned perjury." *United States v. Hansen*, 964

F.2d 1017, 1021 (10th Cir. 1992). Mr. Whitehead answered "no" when asked whether he tried to get Ms. Shockley to take responsibility for that gun. The government was, in other words, asking Mr. Whitehead whether he was trying to get Ms. Shockley to take responsibility for a gun that she had no responsibility for. Mr. Whitehead answered that in the negative—because, as he testified moments later, it was his position that "the gun wouldn't have been there if it [hadn't been] for Janishia['s] mom moving." ROA, Vol. 3, 135–136 (132–133). The alleged falsity of these statements is not "evident" from the record as the government contends.

Conclusion

For these reasons, and for the reasons argued in his opening brief, Mr. Whitehead asks this court to find the jury was presented with insufficient evidence to conclude Mr. Whitehead intended to control the firearm beyond a reasonable doubt and to find the perjury enhancement improperly applied requiring vacation and remand. Mr. Whitehead continues to press that his conviction is unconstitutional under the Second

Amendment but understands the precedent in this circuit as stands prevents this court from ruling in his favor at this time.

Respectfully submitted,

s/ *Laura K. Deskin*
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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ *Laura K. Deskin*

IN THE

Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX E

Judgment of Conviction in the U.S. District Court for the Western District of Oklahoma (March 18, 2024)

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA
v.
OTIS RAY WHITEHEAD, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-23-00280-001

USM Number: 71928-510

JUSTIN PATRICK HILL
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) ONE (1) OF THE INDICTMENT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) and 924(a)(8)	FELON IN POSSESSION OF A FIREARM	03/14/2023	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

MARCH 18, 2024
Date of Imposition of Judgment

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

March 18, 2024
Date Signed

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
EIGHTY-SEVEN (87) MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

It is recommended the defendant be designated to FCI El Reno,

It is recommended the defendant participate in RDAP if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **THREE (3) YEARS**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, drug trafficking, stolen, fraudulently obtained or counterfeit checks, financial documents, or unreported assets at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

2. The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall actively participate in the treatment program until successfully discharged from the program or until the probation officer has excused the defendant from the program. The defendant shall totally abstain from the use of alcohol and other intoxicants. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The defendant shall contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

3. The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

4. The defendant shall not associate with any known gang members; however, some contact may be permitted at the discretion of the U.S. Probation Office (*e.g.,* family members).

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: WHITEHEAD, JR., OTIS RAY
CASE NUMBER: CR-23-00280-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated 02/16/2024 (doc. no. 81).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.